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# **The Development of the Implied Terms on Quantity in the Law of Sale of Goods**

*The history of the development of the implied terms on short delivery is a complex story of judicial and academic ignorance of law and facts. Sir Mackenzie Chalmers' statutory formulation of the right to correct delivery was the same as that provided in Judah Benjamin's 1868 work on sales. However, Benjamin's formulation was flawed, which led to a highly unsatisfactory rule of law. This article considers the history of the case law on short delivery, leading up to the 1893 codification. The operation of the statutory rule further illustrates the depth of confusion which remained following codification. A comparison with the history of short delivery in the United States demonstrates that the confusion within the English system could easily have been avoided.*

## **I. INTRODUCTION**

If a seller delivers the wrong quantity of goods to the buyer, the Sale of Goods Act 1979 ('SGA 1979'), s. 30(1) provides that 'the buyer may reject the goods'. In 1983 the joint Consultation Document of the Law Commission and the Scottish Law Commission on the Sale and Supply of Goods stated that '[t]he intention seems to be, though it is not stated in so many words, that a buyer who rejects the whole consignment may also rescind the contract as upon breach.'<sup>1</sup> Four years later, the Law Commissions were more circumspect: the rules in SGA 1979, s. 30 'do not form a complete code for dealing with cases of wrong quantity. In particular, they do not say when a contract may be treated as discharged for delivery of a wrong quantity.'<sup>2</sup> Most recently the Law Commissions have stated that they do not see any particular need to reform the provisions of section 30, primarily because '[c]onsultees tended to see section 30 as a reasonable, sensible and logical set of rules to deal with the wrong

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<sup>1</sup> Law Commission and Scottish Law Commission, *Sale and Supply of Goods* (Law Com Working Paper 85, Scot Law Com Consultative Memorandum 58, 1983) para. 6.27. This contention was supported by reference to *Wm Barker (Jr) & Co Ltd v Edward T Agius Ltd* (1927) 33 Com Cas 120, 130, discussed further below at text following n 206.

<sup>2</sup> Law Commission and Scottish Law Commission, *Sale and Supply of Goods* (Law Com 160, Scot Law Com 104, 1987) para. 6.17. This paragraph also stated: '[The rules] are also phrased in terms of what the buyer may reject, not what he may accept. Clearly the rules contemplate that the buyer may sometimes be entitled to accept a short delivery, or a delivery of an excess quantity, but there may be circumstances when the buyer is not entitled to do so. Whether a buyer may ever accept goods of a different description delivered in error must be somewhat doubtful. There is also a grey area between goods of the correct description which are simply defective, and goods which could be regarded as perfect goods of a different description.' This conflation of descriptive and quantitative aspects is indicative of the imprecise thinking on this issue.

quantity of goods being delivered.’<sup>3</sup> In considering the right to reject in general, the Law Commissions noted that ‘[a]lthough the right to reject has a long history, it has generated relatively few cases.’<sup>4</sup> The Law Commissions were specifically focused on consumer remedies, and in that context their statement is probably accurate. Yet there is a considerable volume of judicial consideration of the matter,<sup>5</sup> which may explain the earlier Law Commissions’ view that section 30(1), ‘which is placed among a set of provisions about delivery, appears in origin to be no more than an enumeration of the results of particular decisions.’<sup>6</sup> This confusion and ambiguity over the legislative provisions on short delivery justifies a historical enquiry,<sup>7</sup> which will demonstrate the difficulty with enumerating any particular conclusions about the nature of the right to reject for short delivery that existed prior to the Sale of Goods Act 1893 (‘SGA 1893’), s. 30(1) (which is identical to the modern provision).

The next section evaluates the common law on short delivery leading up to the 1893 codification. It will show how Judah Benjamin’s formulation of a doctrine on short delivery appeared to corral the case-law into an organised body of law. However, it can be argued that Benjamin’s approach to the cases was misleading. The unstable foundations would not be reinforced by the case-law between Benjamin’s seminal text of 1868 and Chalmers’ codification of sales in the 1890s; indeed some of the intervening decisions exacerbated the problems with short delivery. This history will show how the judicial explanations of the consequences of short delivery lacked any coherent theoretical basis, as well as demonstrating how such contradictions continued even after the SGA 1893. That this is so should not be surprising; as Verplanck noted in 1825, at the very outset of the period under

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<sup>3</sup> Law Commission and Scottish Law Commission, *Consumer Remedies for Faulty Goods* (Law Com 317, Scot Law Com 216, 2009) para. 3.127. This unwillingness to reform is replicated in the draft Consumer Rights Bill (current version available at < <http://tinyurl.com/ojxpsn> > accessed 22 August 2014), where clause 25 merely replicates the SGA provisions on incorrect delivery. For a reform proposal, see e.g. Sean Thomas, ‘The right to reject for short delivery and termination’, 11 *Journal of International Trade Law and Policy* (2012), 44.

<sup>4</sup> Law Commission and Scottish Law Commission, *Consultation Paper on Consumer Remedies for Faulty Goods* (Law Com CP 188, Scot Law Com DP 139, 2008) para. 3.20.

<sup>5</sup> Cf. John Honnold, ‘Buyer’s Right of Rejection: A Study in the Impact of Codification Upon a Commercial Problem’, 97 *University of Pennsylvania Law Review* (1949), 457, 457: ‘rejection ‘has vexed courts and legislative draftsmen since the beginning of sales law.’

<sup>6</sup> Law Commission and Scottish Law Commission, *Sale and Supply of Goods* (above n 1) para. 6.27

<sup>7</sup> This sort of enquiry necessitates the usual caveat about interpreting codifying statutes: *Bank of England v Vagliano Bros* [1891] AC 107, 144-145 (Lord Herschell). See also HH Judge Chalmers, *The Sale of Goods Act, 1893, including the Factors Acts, 1889 & 1890*, 2nd ed., London, 1894, iii: ‘the decided cases [preceding the SGA 1893] are only law in so far as they are correct and logical deductions from the language of the Act. Each case, therefore, must be tested with reference to the Act itself. But it may be none the less useful to the reader to call his attention to the decisions which formed the basis of the various sections, and which were intended to be reproduced in the Act. In so far as the law is unaltered, they are still in point as illustrations.’

consideration herein, '[t]he incongruities of our law are more a matter of regret than of surprise. The reason of their existence is to be found in its history.'<sup>8</sup> Nevertheless, a brief comparison with the American experience demonstrates that the difficulties evident in English law were effectively avoided as a result of greater care taken by American commentators (in contrast to Benjamin and Chalmers' efforts).

## II. THE DEVELOPMENT OF THE RIGHT TO CORRECT DELIVERY

Three main factors helped mould the modern law of contract and tort:<sup>9</sup> the reduction in the boundaries between the forms of action, the shift in power from jury to judge,<sup>10</sup> and the rise of textbook writers. This analysis pays particular attention to the third factor, but the other two are not ignored. Developments in the forms of action by the nineteenth century meant that buyers were able to bring a contractual action in assumpsit for fraudulent misrepresentations, but not for non-fraudulent misrepresentations which did not breach a warranty.<sup>11</sup> For buyers this was problematic if they had a warranty: they were obliged to sue on the warranty rather than simply claim for non-performance. Conversely, if the seller sued for goods sold and delivered, the buyer would be obliged to pay the full price and regain any loss by suing for breach of the warranty. Although relaxation in the forms of actions reduced the needs for such cross-actions,<sup>12</sup> acceptance of goods obliged the buyer to pay the price, which had the effect of crystalizing the importance of rejection,<sup>13</sup> and reinforced the importance of determining whether a sales contract was entire. This can be seen from the 1805 decision of the Court of Common Pleas in *Waddington v Oliver*, which concerned a sale

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<sup>8</sup> Gulian C. Verplanck, *An Essay on the Doctrine of Contracts: Being an Inquiry How Contracts are Affected in Law and Morals, by Concealment, Error, or Inadequate Price*, New York, 1825, 59.

<sup>9</sup> David Ibbetson, *A Historical Introduction to the Law of Obligations*, Oxford, 1999, 153.

<sup>10</sup> On the removal of jury trial from commercial disputes, see e.g. Robert B. Ferguson, 'The Adjudication of Commercial Disputes and the Legal System in Modern England', 7 *British Journal of Law and Society* (1980), 141, 142-144; Conor Hanly, 'The Decline of Civil Jury Trial in Nineteenth-Century England', 26 *The Journal of Legal History* (2005), 253.

<sup>11</sup> Michael Lobban, 'Contractual Fraud in Law and Equity, c1759-c1850', 17 *Oxford Journal of Legal Studies* (1997), 441, 460.

<sup>12</sup> Ibid., 461; Michael Lobban, 'Part Two: Contract', in William Cornish, J. Stuart Anderson, Ray Cocks, Michael Lobban, Patrick Polden, and Keith Smith, eds., *The Oxford History of the Laws of England: Volume XII: 1820-1914 Private Law*, Oxford, 2010, 313-322: the real problem for nineteenth century contract law was the distinction between Law and Equity, and not the forms of action. For a brief example of contemporary recognition of the tension between Law and Equity, see n 102. The problem of discerning the law from cases affected by forms of action was noted by Story: William W. Story, *A Treatise on the Law of Sales of Personal Property, with illustrations from the foreign law*, Boston, 1847, 311-313. See further *Champion v Short* (1807) 1 Camp 52, 55; 170 ER 874, where Campbell notes 'of late years, there has been a strong inclination in our Courts, as far as is consistent with the rules of law, to do substantial justice between the parties at once, without creating the necessity for a cross-action'.

<sup>13</sup> Lobban, 'Contractual Fraud', 460-461 (disputes over the quality of goods).

of 100 bags of hops to be delivered at a particular time.<sup>14</sup> Before the delivery period expired, the seller made a partial delivery. Because ‘the contract was entire and could not be split ... the [seller] therefore had no right to bring an action until the whole quantity was delivered or until the time for delivering the whole had arrived.’<sup>15</sup> The absence of reference to the Statute of Frauds, along with the fact the action was one brought by the seller for goods sold and delivered, suggests that this was an exposition of a distinct rule of law,<sup>16</sup> i.e. that a buyer could not be forced into taking a quantity of goods by means of individual parcels each covered by a separate contract.<sup>17</sup> The presumption in favour of entire contracts was rebuttable, by evidence of acceptance of any goods actually delivered.<sup>18</sup> Conversely, if the buyer made it impossible for the seller to ascertain the correct quantity the seller was not required to deliver the goods, and the contract was terminated.<sup>19</sup> The delivery date was vital: a buyer who suffered short delivery was ‘not bound to pay for that part before the expiration of the time fixed for the delivery of the whole. For if the seller fails to complete his contract, the purchaser may return the part delivered.’ But if the buyer did retain goods, ‘he must then pay the value of it’.<sup>20</sup> So in *Oxendale v Wetherall*,<sup>21</sup> the buyer argued the contract was entire, and for 250 bushels, and that the seller’s claim for goods sold and delivered should be dismissed for failure of performance. A jury decided that the contract was entire, but there

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<sup>14</sup> (1805) 2 B & P (NR) 61; 127 ER 544.

<sup>15</sup> *Ibid.*, 62; 545.

<sup>16</sup> Cf. *Baldey v Parker* (1823) 2 B & C 37; 107 ER 297 (approved and followed in *Bigg v Whisking* (1853) 14 CB 195; 139 ER 80), noting that the contract was entire (which was determined according to the parties intentions) which would bring it within the aegis of the Statute of Frauds. The contract in *Baldey* was for various different goods at different values; combined they were for a value sufficient to bring the Statute into operation (i.e. £10). It was also noted that the purpose of finding contracts to be entire was to deal with such cases. On the levels of (non)compliance with the Statute of Frauds, see R.B. Ferguson, ‘Commercial Expectations and the Guarantee of the Law: Sales Transactions in Mid-Nineteenth Century England’, in G.R. Rubin and David Sugarman, eds., *Law, Economy and Society, 1750-1914: Essays in the History of English Law*, Abingdon, 1984, 192. It is also worth briefly noting that *Waddington v Oliver* appeared to go against earlier decisions: Sir John Comyns and Stewart Kyd, *Digest of the Laws of England*, 4th ed., Dublin, 1793, vol 1, 146-47 and Sir John Comyns, *The Law of Contracts and Promises upon various subjects and with particular persons, as settled in the Action of Assumpsit*, 2nd ed., London, 1824, 184-85.

<sup>17</sup> This would eventually develop into the prohibition against enforced delivery by instalments: SGA 1979, s. 31(1).

<sup>18</sup> *Champion v Short* (1807) 1 Camp 52, 54-55; 170 ER 874 (Lord Ellenborough). This approach would be followed in John William Smith, *A Compendium of Mercantile Law*, London, 1834, 311, citing *Champion* in support for the rule that ‘if a purchaser order several things at the same time, he may consider the contract as entire, and object to receive some of them without the rest’. For a later expression of the same logic, see *In re Hall & Baker* (1878) LR 9 ChD 538, 545 (Sir George Jessel MR): a shoemaker cannot get away with demanding payment after offering just one of a pair of shoes.

<sup>19</sup> *Pringle v Taylor* (1809) 2 Taunt 150, 155; 127 ER 1034, 1037 (Mansfield CJ: the ‘contract therefore was at an end’; Chambre J: the contract had been ‘vacated’).

<sup>20</sup> *Shipton v Casson* (1826) 5 B & C 378, 382; 108 ER 141, 143 (Abbott CJ). *Shipton* was also reported at 8 Daw & Ry KB 130 and at 4 LJ OS KB 199 (as *Shipton v Cassen*).

<sup>21</sup> (1829) 9 B & C 386; 109 ER 143. Also reported at 7 LJ OS KB 264 and at 4 Man & Ry KB 429.

had been a delivery of 130 bushels which the buyer retained. Thus the Court of King's Bench unanimously held that the buyer was obliged to pay for that part retained.<sup>22</sup> Yet whilst the buyer was not obliged to pay prior to complete delivery, he was obliged to wait until the expiration of the delivery period before bringing an action against the seller for breach of contract.<sup>23</sup>

The importance of the choice between acceptance and rejection was clear, as was the consequence of acceptance. But what was the consequence of rejection for short delivery? The proto-texts on commercial law in the 1820s and 1830s failed to examine this point.<sup>24</sup> Rejection was merely treated as a mechanism for avoiding a claim by the seller for goods sold and delivered. Because it was unnecessary to consider whether the contract was terminated in such cases, the consequences of short delivery would remain unclear. This conceptual gap remained in judicial and academic analysis throughout the middle of the 19th century, causing doctrinal complexity.

### 1. *Judah Benjamin's formulation*

The first major text on the English law of sale, Blackburn's influential work of 1845,<sup>25</sup> contained no analysis of short delivery,<sup>26</sup> and it would be Benjamin's masterpiece of 1868 which provided the analytical structure that would remain orthodoxy for further commentary

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<sup>22</sup> (1829) 9 B & C 386, 387-388; 109 ER 143, 144 (Lord Tenterden CJ, Bayley and Parke JJ). Parke J had been counsel for the defendants in *Shipton v Casson*, where he was stopped by the court which contained Lord Tenterden and Bayley J. See also *Mavor v Pyne* (1825) 3 Bing 285, 288; 130 ER 522, 525 (Best CJ): 'If a man agrees to deliver me one hundred quarters of corn, and after I have received ten quarters, I decline taking any more, he is at all events entitled to recover against me the value of the ten that I have received.'

<sup>23</sup> *Shipton v Casson* (1826) 5 B&C 378, 383; 108 ER 141, 144 (Bayley J).

<sup>24</sup> Humphry W. Woolrych, *A Practical Treatise on the Commercial and Mercantile Laws of England*, London, 1829, 220, mentioning *Waddington v Oliver* with regard to the prohibition on splitting delivery, and merely stating (at 269) in the context of the law on payment: 'A contract being entire, all the goods bargained for must be delivered or the sale cannot be enforced'. See also Smith, *Compendium of Mercantile Law*, 308, merely mentioning *Oxendale v Wetherell* and *Shipton v Casson* only in the context of the impact of the buyer's retention of the goods.

<sup>25</sup> Colin Blackburn, *A Treatise on the Effect of the Contract of Sale, on the Legal Rights of Property and Possession in Goods, Wares, and Merchandize*, London, 1845. The earlier texts (above n 24) were merely compendiums rather than analytical discourses, and relegated sales to a mere chapter within the broader context of commerce: Blackburn's work marked an important shift in the representation of law in general, and sales in particular. A possible notable exception might be George Joseph Bell, *Inquiries into the Contract of Sale of Goods and Merchandise as recognised in the judicial decisions and mercantile practice of modern nations*, Edinburgh, 1845, which dealt with English and Scottish law, but did not have the same currency in England as Blackburn's work.

<sup>26</sup> Blackburn focused on determining the point property passed in a sale, and the seller's rights following that point: Blackburn, *Contract of Sale*, xiii. Smith, *Compendium of Mercantile Law* discussed delivery (at 303-305) but not short delivery specifically.

(and later legislation) on short delivery.<sup>27</sup> However, Benjamin's description of the law on short delivery must first be contextualized in light of his views on failure of consideration. Benjamin supported his analysis of the distinctions between total and partial failure of consideration with short-delivery cases, but did not appear to draw any explicit connection between failure of consideration and short delivery.

As Benjamin noted, the 1797 decision *Giles v Edwards*,<sup>28</sup> showed how it was 'settled law that a man who had advanced money on a contract of sale had a right to put an end to his contract for failure of consideration, and recover it an action for money had and received, if the vendor failed to comply with his entire contract.'<sup>29</sup> Developing this, Benjamin argued that '[w]here the failure of consideration is only partial, the buyer's right to rescind will depend on the question whether the contract is entire or not', thus, where the contract was entire (as in *Giles v Edwards*) 'and the buyer is not willing to accept a partial performance, he may reject the contract *in toto*, and recover back the price. But if he has accepted a partial performance, he cannot afterwards rescind the contract, but must seek his remedy in some

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<sup>27</sup> J.P. Benjamin, *A Treatise on the Law of Sale of Personal Property; With References to the American Decisions and to the French Code and Civil Law*, London, 1868. At iii Benjamin justifies his own text by reference to the limitations of Blackburn's work. As to the impact of this text, see Catharine MacMillan, *Mistakes in Contract Law*, Oxford, 2010, 125. A second edition arrived after five years: J.P. Benjamin, *A Treatise on the Law of Sale of Personal Property; With References to the American Decisions and to the French Code and Civil Law*, 2nd ed., London, 1873. A third edition in 1883 was prepared by editors with Benjamin's consent: Arthur Beilby Pearson and Hugh Fenwick Boyd (eds.), *Benjamin's Treatise on the Law of Sale of Personal Property; With References to the American Decisions and to the French Code and Civil Law*, 3rd ed., London, 1883, v: Benjamin had 'accordingly revised and approved the Editor's labours up to the end of the Chapter on Delivery'. The focus herein is on the first two editions. Bell, *Inquiries into the Contract of Sale of Goods* provides a useful allusion to the problem at the heart of this debate: the effect of a short delivery. Bell wrote (at 83) that the seller remains obliged to deliver the whole even if the delivery is short, and the seller is only entitled to keep the price of what is delivered if the buyer keeps said goods, '[f]or, in trade, I may have in contemplation what is utterly defeated by a partial failure, and I may not only reject the imperfect performance, but claim for damages in consequence of disappointment.' This appears to be representative of a rule present in both systems, for in *Devaux v Connolly* (1849) 8 CB 640; 137 ER 658, discussed below at text accompanying n 34, this rule was judicially accepted and clarified. Furthermore, it is worth briefly noting that the issue of short delivery was not considered in the *Second Report of the Commission on Mercantile Laws*, XVIII HC Parliamentary Papers (1855), 653. That report considered the possibility of unifying English and Scottish commercial law, and the absence of discussion of short delivery suggests that there was no identifiable material distinction on the matter.

<sup>28</sup> (1797) 7 TR 81; 101 ER 920. This case involved a sale of wood, whereby the seller was obliged to do certain acts to the wood prior to disposition to the buyer. His failure to do so resulted in a failure of consideration.

<sup>29</sup> Benjamin, *Sale of Personal Property*, 308 (this was unchanged in the second edition Benjamin, *Sale of Personal Property*, 2nd ed., 331). Cf. Ibbetson, *Historical Introduction to the Law of Obligations*, 273 fn 54: 'The requirement that the consideration must have failed totally was not fixed until *Hunt v. Silk* (1804) East 449 [102 ER 1142] ... but it is strongly implicit in ... [William Evans, *Essay on the Action for Money Had and Received*, 1802, 25-34 (available at <<http://people.mcgill.ca/files/lionel.smith/evanscopy.pdf>> accessed 22 August 2014)].

other form of action.<sup>30</sup> As an example, Benjamin cited *Harnor v Groves*,<sup>31</sup> which would eventually become cited as authority for the rule that a buyer is deemed to have accepted goods if he does something to them inconsistent with the seller's ownership.<sup>32</sup> In *Harnor*, the buyer had obtained delivery of a portion of the bulk of goods (sacks of flour). Some of the delivered goods were of insufficient quality, but the buyer used that portion that he could, and as such was unable to rescind the contract. Immediately following this example, Benjamin wrote the following:

So if the buyer has paid for a certain quantity of goods, and the vendor has delivered only part, and makes default in delivering the remainder, the buyer may rescind the contract for the deficiency, and recover the price paid for the quantity deficient; for the parties in this case have, by their conduct, given an implied assent to a severance of the contract by the delivery on the one part and the acceptance on the other, of a portion only of the goods sold. This is in its nature a *total* failure of consideration for part of the price paid; not, as in the case of the flour, a *partial* failure of the whole.<sup>33</sup>

In support of this, Benjamin referred to *Devaux v Connolly*,<sup>34</sup> a decision of the Court of Common Pleas six years prior to *Harnor* (though not cited in *Harnor*), where goods delivered were underweight (the first parcel was 23 tons compared to an order for 25, the second was 132 compared to 150). Although the buyers paid the price as against the bills of lading, and sub-sold the goods, they never accepted them as satisfying the order and claimed for the difference, bringing an action for *inter alia* money had and received. Cresswell J, giving the judgement of the Court, said

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<sup>30</sup> Benjamin, *Sale of Personal Property*, 309. In the second edition, which is otherwise identical to the first edition on this point, Benjamin also made reference to *Whincup v Hughes* (1870-71) LR 6 CP 78 (a case concerning an apprenticeship contract): Benjamin, *Sale of Personal Property*, 2nd ed., 332 fn 6. Arguably, the treatment of employment contracts as commensurable with other contracts is a causal factor in the confusion over the nature of termination: see e.g. Thomas, 'The right to reject for short delivery and termination', 57-58, and fn 104.

<sup>31</sup> (1855) 15 CB Rep 667; 139 ER 586. The report at 24 LJ CP 53 differs in wording and not substance; 3 WR 168 is a very short report.

<sup>32</sup> See e.g. Chalmers, *The Sale of Goods Act*, 2nd ed., 68.

<sup>33</sup> Benjamin, *Sale of Personal Property*, 310.

<sup>34</sup> (1849) 8 CB 640; 137 ER 658. The report at 19 LJ CP 71 is the same (though the reports of arguments of counsel differ).



there is nothing to shew that the plaintiffs ever meant to take the terra japonica at a price exceeding the limits they had given (for, the defendant represented that he had not exceeded those limits), or to accept the baskets and leaves as a substitution for an equal weight of terra japonica [this had been claimed by the defendants to be the custom in Singapore, where the goods were shipped]. It appears, therefore, to us to be a simple case of failure of consideration; and that the plaintiffs are entitled to recover the excess, as money had and received to their use.<sup>35</sup>

This rationalisation, that it is ‘a simple case of failure of consideration’, is of particular historical importance as it provided a precedent for two later cases on the impact of the SGA 1893 on short delivery cases,<sup>36</sup> yet it also illustrates the valuable impact of *Devaux*.<sup>37</sup> Prima facie, it is hard to distinguish *Devaux* and *Harnor*: both involved actions where the goods were used in a manner inconsistent with the vendor’s ownership. However, the failure of consideration in *Harnor* resulted not from a short delivery, but a substandard quality. This is key, because whilst quality issues raise the spectre of caveat emptor and the need to prove a warranty, quantitative issues are much easier to conceptualise without a warranty. In other words, standards of quality admit a greater variation of meaning than a particular quantitative amount, which in turn would necessitate the warranty – as an addition to the terms of the sale – to obtain the necessary quality.<sup>38</sup> Consequently, actions for money had and received remained viable for quantity disputes.<sup>39</sup>

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<sup>35</sup> (1849) 8 CB 640, 667-668; 137 ER 658, 671.

<sup>36</sup> *Behrend & Co Ltd v Produce Brokers Co Ltd* [1920] 3 KB 530, discussed below at text following n 199, and *Ebrahim Dawood v Heath* [1961] 2 Lloyd’s Rep 512, discussed below at text following n 223.

<sup>37</sup> Cf. Smith, *Compendium of Mercantile Law*, 303: ‘The vendor must deliver the goods as soon as the vendee has performed all conditions precedent on his part, and may, if he refuse to do so, be sued either specifically, for non-performance of his contract, or in trover, for the goods themselves.’ This outline clearly rests on this distinction between an action for non-delivery per se, and an action for total failure of consideration. Unfortunately, Smith does not continue his analysis of this distinction any further, for it appears to be the first suggestion that short-delivery may be actionable in itself (the point is not made, for example, in the earlier text Woolrych, *Practical Treatise*).

<sup>38</sup> On the distinction between quantitative and qualitative defects, and the impact on the reasoning concerning failure of consideration, see S.J. Stoljar, ‘The Doctrine of Failure of Consideration’, 74 *Law Quarterly Review* (1959), 53, 68 fn 86.

<sup>39</sup> See e.g. Stoljar, ‘The Doctrine of Failure of Consideration’, 56-62. Stoljar notes *Devaux v Connolly* at 65, and raises (at fn 67) the problem of the partial delivery, which meant that ‘the excess thus claimed seemed more akin

Arguably, at this stage the law of sale could have developed a simple solution to short delivery, which would be rescission for failure of consideration, notwithstanding that there was a partial delivery that was itself sub-sold. That aspect of the sale could be, in Benjamin's words, severed,<sup>40</sup> meaning that 'recovery only went to the extent to which B's consideration actually failed.'<sup>41</sup> However, within a decade of the decision in *Devaux* an alternative approach to short delivery would develop.

## 2. *From failure of consideration to breach of contract*

*Giles v Edwards* raised the question of whether a breach would be sufficient to permit termination, which effectively placed the issue within the scope of warranty disputes.<sup>42</sup> This would have made it a question of law, beyond the reach of jury analysis.<sup>43</sup> However, it would also have the effect of reducing the buyer's capacity to terminate the entire contract; instead, he would have to be content with damages for the breach in the form of the short delivery.<sup>44</sup> The initial judicial step was taken in *Levy v Green*,<sup>45</sup> which involved the delivery of a lesser quantity of contracted goods combined with unrequested goods. The seller brought an action for goods sold and delivered. Lord Campbell CJ and Wightman J were of the opinion that the buyer had a right to reject the goods because the seller had not performed their contractual obligations.<sup>46</sup> Whilst Coleridge and Erle JJ disagreed with the conclusion (forcing an appeal to the Court of the Exchequer Chamber), they did so on the grounds that 'the mere addition of distinguishable articles to an order does not entitle the purchaser to reject the goods ordered'

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to action for damages', though this could be resolved by the possibility of 'an intermediary group of claims, claims which are not liquidated but are also not quite as unfixed as damages'.

<sup>40</sup> It is important to note that this does not mean that Benjamin took this position. At Benjamin, *Sale of Personal Property*, 420-422, he discussed the judicial construction and interpretation of conditions, and concluded (at 422) that a condition precedent could change its 'character, and become a warranty, or independent agreement', on the basis it would be unjust for a partial delivery to be retained. A party would be obliged to perform whilst providing the opportunity for an action for damages for the imperfect performance. Yet '[i]t is in the application of this rule that the cases have not been harmonious, and the practitioner is often embarrassed in advising', due to a lack of certainty over what sort of cases qualify for this treatment. Benjamin cited (at fn 2), inter alia, *Jonassohn v Young* and *Hoare v Rennie*, which, as shown below (see text following n 80), caused considerable difficulty. This point is noted by an anonymous author in 'The Rescission of Contracts of Sale of Goods', 51 *The Law Times* (1874), 248.

<sup>41</sup> Stoljar, 'The Doctrine of Failure of Consideration', 74-75.

<sup>42</sup> *Ibid.*, 63.

<sup>43</sup> Ibbetson, *Historical Introduction to the Law of Obligations*, 224-225.

<sup>44</sup> Stoljar, 'The Doctrine of Failure of Consideration', 76.

<sup>45</sup> (1857) 8 E & B 575; 120 ER 214; 27 LJ QB 111 (Queen's Bench); (1859) 1 E & E 969; 120 ER 1174; 28 LJ QB 319; 33 LT OS 241; 5 Jur NS 1245 (as *Levi v Green*); 7 WR 486 (Exchequer Chamber). Followed with approval by the Irish Court of Appeal in *Tarling v O'Riordan* (1878) 2 LR Ir 82.

<sup>46</sup> (1857) 8 E & B 575, 579-580, 582-583; 120 ER 214, 217-218, 218-219.

(Coleridge J),<sup>47</sup> or the excess goods were mere dunnage and thus insufficient to support rejection (Erle J).<sup>48</sup> The Exchequer Chamber agreed with Lord Campbell CJ and Wightman J's concerns about the possible implications of requiring the buyer to either accept goods he did not order or to separate out such goods from those he did want. The doctrinal justification they gave in holding that the buyer could reject was that 'tender of the goods to the defendant must be an unconditional and unqualified tender of the goods ordered'.<sup>49</sup> This formulation suggests a subtle, but important, shift in judicial thinking about the characterisation of the consequences of short delivery,<sup>50</sup> from the problem being failure of consideration to failure to meet the terms of the contract. In the words of Martin B 'the plaintiffs were bound to prove, as they would have had to prove in an action for not accepting, that they offered to the defendant the same goods which he had ordered and agreed to pay for',<sup>51</sup> and for Bramwell B the buyer 'was entitled to an unconditional tender: and such a tender not having been made, he was at liberty to refuse to accept.'<sup>52</sup> Willes J, Watson B and Byles J all took the same position. There is also an indication that the particular form of action was of limited consequence, for the issue 'in common sense or in law',<sup>53</sup> was contractual performance: 'This is an action for goods sold and delivered, but the question is the same as it would be in an action for not accepting the goods. There was a contract by the defendant for certain specified articles, and nothing was done by him afterwards to alter that contract.'<sup>54</sup>

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<sup>47</sup> Ibid., 581; 218.

<sup>48</sup> Ibid., 583; 219. Willes J thought this was a possibility, but not on the facts as a price was attached (1859) 1 E & E 969, 974; 120 ER 1174, 1177.

<sup>49</sup> (1859) 1 E & E 969, 975; 120 ER 1174, 1177 (Bramwell B).

<sup>50</sup> It is essential to note that the issue here is the characterisation of the consequences of short delivery, and not the test for failure of consideration. It was clear at this stage that the buyer's action for money had and received following a failure of consideration could only subsist if the contract had ended: *Weston v Downes* (1778) 1 Doug Rep 23; 99 ER 19 (and see further n 235). Logically, if the contract is an entire contract (and not one of instalments), then, notwithstanding any real or imaginary right to cure, (short) delivery brings the contract to an end, thus enabling such an action to be brought. As already noted (text accompanying n 9 – n 13), forms of actions were becoming less important compared to the characterisation of the consequences of the actions (see e.g. text accompanying n 54).

<sup>51</sup> Ibid., 973; 1177. The report at 33 LT OS 241 (and also 7 WR 486, 487) is slightly clearer: '[The seller] must offer to deliver the things which the defendant contracted to buy, and not those and others mixed with them.' The report at 5 Jur NS 1245, 1246 is even clearer: 'the defendant, under the circumstances, had the right to reject the whole of the goods, the plaintiffs not having performed what, as sellers, they undertook to do.'

<sup>52</sup> (1859) 1 E & E 969, 975; 120 ER 1174, 1177. Again, the report at 33 LT OS 241 (and also 7 WR 486, 487) is slightly clearer: 'The tender was not an absolute and unconditional tender of the goods ordered ... [the seller] did not execute his part of the contract.'

<sup>53</sup> 5 Jur NS 1245, 1246 (Martin B).

<sup>54</sup> Ibid. Willes J made the same point.

This approach seemed to quickly filter down to the Queen's Bench: a month after the decision in *Levy*, a decision in the complex litigation in *Tamvaco v Lucas*,<sup>55</sup> held that because the cargo was below the minimum quantity specified by the contract the purchaser was not bound to accept the cargo. Lord Campbell LC, Wightman, Erle and Crompton JJ all concluded that the buyer was merely not obliged to accept the goods, rather than a more positive right to reject the goods. This may seem odd, as there was a right to reject in *Levy*,<sup>56</sup> but this difference was justified in the facts, and the real significance of *Tamvaco* was how the judges considered the short delivery to be understood as a simple breach of the agreed terms of the contract:<sup>57</sup> 'the quantity shipped was not, either actually or according to the agreed scale of measurement, within the limits. That is a good ground for not accepting the cargo. The contract is a perfectly plain one: and the parties to it cannot depart from its express provisions.'<sup>58</sup>

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<sup>55</sup> (1859) 1 E & E 592; 120 ER 1032; 28 LJ QB 150; 1 LT 161 and 7 WR 568 (both as *Tamvaco v Lucas*); 5 Jus NS 1258. Counsel for the plaintiffs was Colin Blackburn, who argued ((1859) 1 E & E 592, 593-594; 120 ER 1032; 5 Jus NS 1258-1259) that the provision of a quantitative range (between 1800 and 2200 quarters) was merely in order to provide means of calculating price and any excess or deficiency could be made up, presumably by a claim in damages. This was in turn justified on the grounds that the provision as to quantity was not a condition. The reports in Ellis and Ellis, the Weekly Reporter, and the Jurist state that Mellish, counsel for the defendants, was not called upon. The Law Journal reports that Mellish did provide an argument. Mellish is reported in the Law Journal as having spoken on 10 November 1858, whilst Ellis and Ellis's report, the Weekly Reporter, and the Jurist report are dated 13 June 1859, which may be explained by the complexity of the litigation in this case (various other aspects of the litigation in this case are reported at (1859) 1 E & E 581; 120 ER 1027; 5 Jus NS 731; (1859) 1 B & S 185; 121 ER 683; (1859) 3 B & S 89; 122 ER 34; (1859) 3 F & F 110; 176 ER 49. It is also listed as *Tambago v Lucas* at (1858) 32 LT 92). What Mellish is recorded as arguing is interesting: he claimed (at 28 LJ QB 150, 152) that '[t]he limits are fixed by the parties, so that the plaintiffs cannot be allowed to say that [the defendants were] bound to accept 2,215 quarters; for if so, [they] would be liable to be called upon to take ... any quantity which the ship might contain.'

<sup>56</sup> (1857) 8 E & B 575, 580; 120 ER 214, 217 (Lord Campbell CJ); (1859) 33 LT OS 241, 241 (Martin B).

<sup>57</sup> The Law Journal reports give a possible explanation for this analysis: the decision in *Covas v Bingham* (1853) 2 E & B 836; 118 ER 980, where it was held that the parties had contracted to purchase goods afloat at a price calculated according to the quantity stated in the bill of lading, and not the actual quantity (the goods not being accurately quantified at that point), with the purchaser taking the benefit of an excess and the risk of the short delivery. Consequently, even though there was a short delivery in *Covas*, the purchaser could not recover. In response to a question by Wightman J, Mellish stated that the words in the contract 'buyer's to pay for any excess of weight' were '[p]robably' introduced as a consequence of *Covas*. Lord Campbell CJ distinguished *Covas* (in judgement of which he had sat) as it involved the sale of a specific cargo afloat a specific ship, whereas *Tamvaco* involved a cargo with defined maximum and minimum quantity without a specification as to a particular ship: 28 LJ QB 150, 153. Thus in *Covas*, the terms of the contract allowed for 'a fair mercantile speculation', by showing 'an intention to take this risk[:] ... If the quantity delivered is less the purchaser will suffer; if it turn out more he will gain.' (1853) 2 E & B 836, 843; 118 ER 980, 983 (Lord Campbell CJ).

<sup>58</sup> (1859) 1 E & E 592, 597; 120 ER 1032, 1033. The conclusions of the other judges are of the same tenor. At 5 Jus NS 1258, 1259 Crompton J's point is more express: 'It may be that upon this construction a small variation from the limits will defeat the contract; but when the parties have made an express bargain, assigning certain limits, the safe course is to adhere to those limits.'

*Levy* was referred to by Benjamin in the context of passing of property,<sup>59</sup> and its importance in the context of restricting attempts to impose the duty to sort the goods on the buyer was clearly noticed.<sup>60</sup> However, whilst *Levy* was mentioned immediately prior to the discussion of short delivery, Benjamin did not consider it directly in his discussion of short delivery. *Tamvaco* was not cited by Benjamin at all in the first edition; the second edition did refer to *Tamvaco* in the context of contractual performance,<sup>61</sup> though no further reference to its possible implications for short delivery was made. Nevertheless, Benjamin's language in the first edition is close to that used by the Court of Queen's Bench in *Levy* and *Tamvaco*: 'If ... the delivery is of a quantity less than that sold, it may be refused by the purchaser ... for the contract is not performed by the vendor's delivery of less than the whole quantity sold.'<sup>62</sup> What Benjamin did cite as authority for this proposition was *Oxendale*. Yet there the Court only went as far as holding that non-performance for short delivery prevents the seller recovering the price.<sup>63</sup> The other cases Benjamin cited, *Morgan v Gath*,<sup>64</sup> and *Waddington v Oliver*,<sup>65</sup> also say nothing about the characterisation of short deliveries as failures of consideration, or breaches of contract. This may explain why Benjamin could only claim that a buyer who merely received a short delivery, 'is bound to pay for any part that he accepts; and after the time for delivery has elapsed, he must either return or pay for the part received.'<sup>66</sup> This was the extent of Benjamin's analysis of the issue.

It may be possible though to put forward a possible explanation of the seemingly limited nature of Benjamin's analysis, with a brief excursus into Benjamin's civilian background. Benjamin was a Louisiana lawyer, and his work was hugely influenced by the Louisiana Civil Code 1825.<sup>67</sup> Article 2461 of the 1825 Code stated: 'If the seller fails to make

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<sup>59</sup> Benjamin, *Sale of Personal Property*, 268; Benjamin, *Sale of Personal Property*, 2nd ed., 284-285.

<sup>60</sup> Benjamin, *Sale of Personal Property*, 511-512, 519 fn 7; Benjamin, *Sale of Personal Property*, 2nd ed., 586, 576 fn 7.

<sup>61</sup> Benjamin, *Sale of Personal Property*, 2nd ed., 478-480.

<sup>62</sup> Benjamin, *Sale of Personal Property*, 512; Benjamin, *Sale of Personal Property*, 2nd ed., 568.

<sup>63</sup> See above n 21.

<sup>64</sup> (1865) 3 H & C 748; 159 ER 726. Also reported at 13 LT 96; 34 LJ Ex 165; 11 Jur NS 654; 13 WR 756.

*Morgan* concerned a contract for the delivery of 500 piculs (a particular measurement used in South East Asia) of cotton, but only 420 piculs were delivered. Martin B commented (34 LJ Ex 165, 169-170) that had the buyer simply claimed short delivery, he would have succeeded. However, a jury had found that the buyer had accepted this short delivery, and as such was liable. There is nothing substantive in any of the reports as to the nature of the right to reject, other than statements of the obvious fact that the buyer had, in essence, waived his right to reject by accepting the short delivery.

<sup>65</sup> See above n 14 and accompanying text.

<sup>66</sup> Benjamin, *Sale of Personal Property*, 512; Benjamin, *Sale of Personal Property*, 2nd ed., 568-569.

<sup>67</sup> MacMillan, *Mistakes in Contract Law*, 124-125. A reprint (at 30 *Chicago Legal News* (1897-98), 266) of an article by Pollock B, who had been Benjamin's pupil-master, states the following: 'The principles and practice

the delivery at the time agreed on between the parties, the buyer will be at liberty to demand, either a cancelling of the sale, or his being put in possession, if the delay is occasioned only by the deed of the seller.’<sup>68</sup> However, this provision of a right to cancel the sale clearly did not come through in Benjamin’s analysis of short delivery. The explicit recognition of rescinding the sale in the Louisiana Code can be compared with Roman law. In Roman law a sale was binding prior to delivery, and thus the risk of loss was on the buyer,<sup>69</sup> and so the buyer only had the option of claiming damages for short delivery as opposed to a right to terminate.<sup>70</sup> As Buckland put it, ‘[a]s the buyer took the risk of diminution, so he had the benefit of increase; he was entitled to the thing as it was on delivery.’<sup>71</sup> The Roman approach appears very similar to that taken by Pothier: ‘The action of the buyer, for a defect of quantity, consists in obtaining against the seller a proportionate deduction from the price.’<sup>72</sup>

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of this great system of law [i.e. that in Louisiana] Benjamin knew and appreciated thoroughly, and he was at all times ready to point out its leading features, and how they differed in principle from English law.’

<sup>68</sup> This provision is probably best explained as an adaptation of the French Civil Code 1804, Article 1610, which stated: ‘If the seller fail to make delivery within the time agreed between the parties, the purchaser may at his election demand the rescinding of the sale, or to be put into possession, if the delay have occurred entirely through the act of the seller.’ The most recent version (available at <<http://tinyurl.com/ocw3pfj>> accessed 22 August 2014) reads: ‘Where the seller fails to make delivery within the time agreed upon between the parties, the purchaser may, at his choice, apply for avoidance of the sale, or for his being vested with possession, if the delay results only from an act of the seller.’ It is also important to bear in mind Article 1184, which reads ‘Avoidance must be applied for in court, and the defendant may be granted time according to circumstances.’ The use of “avoidance”, or “rescission”, appears to be the translation of *résolution*.

<sup>69</sup> Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, Oxford, 1996, 287. Cf. Alan Watson, *The Law of Obligations in the Later Roman Republic*, Oxford, 1965, 70: ‘Although it is said that the seller has to deliver the goods this really means that he has to make them available for collection by the buyer. It is up to the buyer to take the goods away.’ Watson rests this on an unclear passage: D. XVII.6.1.4, which concerns cases where the parties fail to agree about delivery. The basic rule was that the seller ‘was bound to deliver the thing itself (*præstare, tradere*)’: Thomas Collett Sandars, *The Institutes of Justinian, with English Introduction, Translation, and Notes*, 7th ed., London, 1962, 365, citing D.XIX.1.11.2; see also Zimmermann, *The Law of Obligations*, 278; R.W. Lee, *The Elements of Roman Law, with a translation of the Institutes of Justinian*, 4th ed., London, 1956, 312; James Mackintosh, *The Roman Law of Sale with Modern Illustrations*, 2nd ed., Edinburgh, 1907, 50-51, 156-57.

<sup>70</sup> The parties could reserve a right to rescind, but this would be *accidentalium negotiorum*, ‘special arrangements of the parties, which did not determine the nature of the contract’: Zimmermann, *The Law of Obligations*, 234. See further e.g. Alan Watson, *The Law of Obligations in the Later Roman Republic*, Oxford, 1965, 45, 57, P.W. Duff, ‘An Arrangement concerning Shortage of Measure, and Pacts in General’, in David Daube, ed., *Studies in the Roman Law of Sale: Dedicated to the memory of Francis de Zulueta*, Oxford, 1959, 64-60; F. de Zulueta, *The Roman Law of Sale*, Oxford, 1957, 41. The buyer may be able to protect himself as against an action for non-payment by claiming non-performance: J.B. Moyle, *The Contract of Sale in the Civil Law*, Oxford, 1892, 97. It should also be noted that this prohibition on buyer’s terminating for breach was not absolute: Zimmermann, *The Law of Obligations*, 317-18, 578. However, the exceptions all appear to concern qualitative rather than quantitative defects.

<sup>71</sup> W.W. Buckland, *A Textbook of Roman Law from Augustus to Justinian*, 3rd ed., Peter Stein ed., Cambridge, 1966, 487; Mackintosh, *The Roman Law of Sale*, 86-87.

<sup>72</sup> R.J. Pothier, *Treatise on the Contract of Sale*, 1762, trans. L.S. Cushing, Boston, 1839, part II, chapter III, article I, §259. This is equivalent to the *actio quanti minoris*.

Pothier's influence on English law, and on Chalmers in particular, is clear.<sup>73</sup> His influence on Benjamin is less overt, but the structure and content of Benjamin's text bears considerable similarity to that of Pothier. Perhaps most intriguing is Benjamin's apparent failure to follow his Louisianan legal heritage, instead taking a further step back to Pothier (and ultimately Roman law) and disregarding the possibility of termination in short delivery cases. What can usefully be drawn from this in the broader context of this argument is the distinction that existed between short delivery per se, and failure to deliver instalments. Generally, failure to pay for an instalment gave the seller the right to cancel the contract under Roman law.<sup>74</sup> As Mackintosh noted this aspect related to 'questions arising in our Courts' on instalment sales,<sup>75</sup> and he specifically cited *Freeth v Burr*.<sup>76</sup> This case is discussed further below,<sup>77</sup> but the distinction between instalment sales and entire sales is important to understanding the characterisation of the consequences of short delivery. The growth in the body of case law concerning the failure of instalment sales eclipsed those cases concerning entire contracts, and the judicial focus on party intention, whilst reasonable as a means of resolving the problem of a failure to deliver an instalment, diverted attention away from the unresolved problems of characterising the consequences of short delivery in entire contracts.

The one other case cited by Benjamin directly on short delivery was *Hoare v Rennie*,<sup>78</sup> decided five months after *Tamvaco*. Benjamin's reference in the first edition was merely a brief, expository description of the case; the second edition stated 'this case is strongly questioned.'<sup>79</sup> It is submitted that *Hoare* was a substantial step in the development of the right to reject for short delivery.<sup>80</sup> However, as will be seen, the effect of *Hoare* was seriously limited by later judicial (mis)treatment, and it is with this decision and those that followed that the effect of installment contracts on the jurisprudence of short delivery can be seen most clearly.

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<sup>73</sup> See e.g. Chalmers, *The Sale of Goods Act*, 2nd ed., vi-vii. See also e.g. Joseph M. Perillo, 'Robert J. Pothier's Influence on the Common Law of Contract', 11 *Texas Wesleyan Law Review* (2004-05), 267.

<sup>74</sup> Mackintosh, *The Roman Law of Sale*, 17.

<sup>75</sup> *Ibid.*

<sup>76</sup> (1874) LR 9 CP 208.

<sup>77</sup> At n 113.

<sup>78</sup> (1859) 5 H & N 19; 157 ER 1083; 29 LJ Ex 73; 8 WR 80. As to the value of Hurlstone and Norman's reports compared to the Law Journal reports: Richard A. Epstein, 'For a Bramwell Revival', 38 *American Journal of Legal History* (1994) 246, 258 fn 28.

<sup>79</sup> Benjamin, *Sale of Personal Property*, 2nd ed., 569.

<sup>80</sup> Cf. *Mersey Steel and Iron Co v Naylor Benzon & Co* (1882) 9 QBD 648 (CA) 658 (Sir George Jessel MR): *Hoare* was 'on demurrer, which the judges seem to have forgotten, and to have treated it as a special case, and drawn inferences of fact.' However, Bowen LJ (at 671) said 'the true explanation of [*Hoare*] is that the plea was a special plea, which set out various facts from which two different inferences might quite well be drawn, and as one or the other is drawn, the decision would appear correct or the reverse.'

In *Hoare* the seller was obliged to deliver to the buyer some 667 tons of iron over the period of four months in the summer of 1859, in equal portions. However, when the sellers only shipped 21 tons in June (after failing to take up the opportunity of commencing shipment in May), the buyers refused to take that delivery. The Court of Exchequer held that the buyer was entitled to so do so. For Pollock CB, the ‘foundation of my opinion is shortly this, that a man has no right to say that that which is a breach of an agreement is a performance of it.’<sup>81</sup> Thus ‘[t]he only question is whether, if a man who is bound to perform his part of a contract does not do so, he can enforce the contract against another party.’<sup>82</sup> More specifically, if ‘the sellers at the outset send a less quantity than they are bound to send, so as to begin with a breach’, the question is whether ‘they can compel the purchasers to accept and pay for that the sending of which was a breach and not a performance of the agreement.’<sup>83</sup> At this point, the analysis seems to be following the breach of contract approach previously taken in *Levy* and *Tamvaco*. However, Pollock CB would go beyond this approach, suggesting that whilst acceptance of goods actually delivered ‘might have made a difference’, ‘[w]here a person has derived a benefit from a contract, he cannot rescind it because the parties cannot be put in statu quo. Probably, therefore, in such case, the [purchaser] could not have repudiated the contract and must have been left to their cross action.’<sup>84</sup> This approach replicates the effect of the failure of consideration approach, and it also suggests, if only faintly, that short delivery may well entail a termination of the underlying contract. However, the sentences that follow in Pollock CB’s judgment are easier to interpret as resting on the contractual breach approach:

[T]he defendants refused to accept the first shipment, because, as they say, it was not a performance but a breach of the contract. Where parties have made an agreement for themselves, the Courts ought not to make another for them ... At the outset the plaintiffs failed to tender the quantity according to the contract: they tendered a much less quantity. The defendants had a right to say that this was no performance of the

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<sup>81</sup> (1859) 5 H&N 19, 26; 157 ER 1083, 1087. The report at 29 LJ Ex 73, 76 is essentially the same. The report at 8 WR 80, 81 is different in wording but not in tenor: ‘all that [then plaintiff] has done being a breach, not a performance, of the contract ... the plaintiff is not intitled to insist upon the defendant receiving the goods, and driving the defendant to his remedy by cross action.’

<sup>82</sup> *Ibid.*, 26; 1087.

<sup>83</sup> *Ibid.*, 27; 1088. The report at 29 LJ Ex 73, 77 is essentially the same.

<sup>84</sup> *Ibid.*, 27-28; 1088.



contract, and they were no more bound to accept the short quantity than if a single delivery had been contracted for.<sup>85</sup>

Watson B and Channell B were both in agreement with Pollock CB; the sellers had been given the option of accelerating the delivery, but no option to delay it,<sup>86</sup> and so they had failed to perform their contractual obligations. The Law Journal report provides further detail about Watson B's thinking in this case: 'the principle upon which I put this case is this, upon the simple contract between the parties, the parties have agreed to furnish goods on certain stipulations, and they must perform their contract. Have they performed their contract? No; they have not.'<sup>87</sup> Yet the same report also has Watson B delivering an intriguing obiter comment: 'if it were necessary to express any opinion, I think that, by that means [refusing to take delivery], they [the buyers] have rescinded the contract, which they have a right to do'.<sup>88</sup> This remark appears at odds with the contractual performance analysis, the sense that it could be interpreted as meaning that short delivery could entail termination (rather than merely being a breach). Yet traces of this modified failure of consideration approach can also be identified in Channell B's judgement. Channell B initially considered the problem as akin to anticipatory breach,<sup>89</sup> but concluded that non-performance was the appropriate analysis:

I think that there was not in the month of June such a shipment as was made necessary by the contract ... this is substantially a contract to ship one fourth of the iron in June ... The plaintiffs have not performed their part of the contract, and the defendants have not accepted anything which can be construed as an imperfect execution of the contract by the plaintiffs.<sup>90</sup>

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<sup>85</sup> Ibid., 28; 1088. The report at 29 LJ Ex 73, 77 is essentially the same, and whilst different wording is used, the report at 8 WR 80, 81 is of the same tenor.

<sup>86</sup> Ibid., 28; 1088 (per Watson B); 29; 1089 (per Channell B). The report at 8 WR 80 replaces Watson B with a 'Braswell B', and merely states that he concurred; presumably this is a reference to Bramwell B (though he does not appear to be involved according to the other reports).

<sup>87</sup> 29 LJ Ex 73, 79.

<sup>88</sup> Ibid.

<sup>89</sup> (1859) 5 H & N 19, 29; 157 ER 1083, 1088-1089: 'The substantial question is, whether the defendants were bound to accept the portion which was tendered, at the time at which it was tendered. That does not depend on the month in which it was tendered, but on the position of the parties at the time of the tender, by which the defendant was placed in the same situation as if, at the time of the tender, notice had been given to him that there would be no further shipment in all June.'

<sup>90</sup> Ibid., 29; 1089. See also 29 LJ Ex 73, 79-80. The report at 8 WR 80, 81 is similar in tone.

However, the final part of Channell B's judgement is indicative of the problems at the heart of this analysis. In the Hurlstone and Norman report of the case, Channell B is reported as saying '[t]he defendants were thus at liberty to rescind the contract',<sup>91</sup> yet in the Law Journal report, Channell B is recorded thus: the buyers 'were at liberty to refuse to accept the cargo, and to refuse payment'.<sup>92</sup> Had the reference to rescinding the contract been in the Law Journal, there would have been correlation with the report of Watson B's judgement. The fact it was in Hurlstone and Norman begs the questions whether there was a judicial attempt to return to the failure of consideration approach, or whether this was an instance of misreporting. Either way, it is unclear as to the status of the failure of consideration approach.

Arguably, the effect of *Hoare*, treated as merely an example of the right to reject by Benjamin,<sup>93</sup> was an implicit reconciliation of the approaches taken in *Devaux* and *Tamvaco* (neither of which were mentioned in *Hoare*): in the event of short delivery the buyer has a right to reject, founded on the actual breach of the contract.<sup>94</sup> A short delivery is an actual breach, and not an anticipatory breach, even if the seller has time remaining to cure. The buyer would have the more powerful right to reject rather than the weaker immunity from an obligation to accept. However, the relationship between rejection and termination remained unclear. The contrasting reports illustrate and exacerbate this confusion.

Four years after *Hoare* came *Jonassohn v Young*,<sup>95</sup> the report of which merely states there was a decision for the defendant and no reasoned judgment was given. Nevertheless the arguments over the pleas give some indication of the judicial opinion of *Hoare*. In *Jonassohn* the plaintiff sold coal of a certain quality to the defendant: the quantity was to be as much

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<sup>91</sup> Ibid.

<sup>92</sup> 29 LJ Ex 73, 80. At 8 WR 80, 81: the buyers 'were justified in refusing to receive the smaller quantity.'

<sup>93</sup> Chalmers merely uses *Hoare* as an example of where failure to deliver an instalment goes to the root of the contract: HH Judge Chalmers, *The Sale of Goods Act*, 2nd ed., 64 fn 3. This would seem to come from a misreading of *Jonassohn v Young* (1863) 4 B & S 296; 122 ER 470, discussed in the text following n 95.

<sup>94</sup> If the contract is worded adequately, such as where a second contract can only be understood as involving the residue following delivery under an initial contract, then there is no short delivery: see e.g. *Arbuthnot v Streckeisen* (1866) 35 LJ CP 305. Arbuthnot expected 576 bales of cotton from Madras, and had agreed a number of sub-sales. C would get 202 bales; Streckeisen would get 277 bales (in two separate contracts of 123 bales and 154 bales); G would get 97 bales. All the sub-purchasers agreed to take what arrived deliverable. Only 275 bales arrived deliverable: Arbuthnot delivered 60 to C, 30 to G, 33 to Streckeisen under the first agreement and the remaining 152 bales to Streckeisen under the second contract. Streckeisen refused to accept this short delivery, and Arbuthnot sued. Willes J, giving the sole substantive opinion, said (at 306) that although the first 'contract was broken' because the Arbuthnot only delivered 33 bales when he should have delivered 123, the second contract was 'fulfilled ... because [Arbuthnot] only contracted to delivered what they had beyond 123 bales, and this they tendered.'

<sup>95</sup> (1863) 4 B & S 296; 122 ER 470; 32 LJ QB 385. The report in Best and Smith appears more complete than that available in the Law Journal. The report at 11 WR 962 gives a slightly different wording, but without any substantive difference.

coal as the defendant's vessel could carry between Sunderland and London in nine months, with the defendant sending the ship to Sunderland for the coal. During the course of performance, it became clear that the coal was of insufficient quality. Consequently the defendant refused to send for any more coal (they also complained of unreasonable delay by the plaintiff). After the defendant failed to send the ship the plaintiff sued for breach. The defendant pleaded, citing *Hoare* in support, that the plaintiff was himself in breach by failing to deliver coal of the relevant quality, and also that the plaintiff had detained the vessel beyond a permitted time, which meant the defendant was 'was justified in throwing up the contract.'<sup>96</sup> Wightman and Blackburn JJ queried whether this justification would collapse if the plaintiff intended to supply satisfactory goods in the future. Counsel's reply was that the specified time and quality elements of the contract meant that 'the non-supply of that coal, and the unnecessary detention of the vessel by the plaintiffs, go to the root of the contract.'<sup>97</sup> For Crompton J this was too much; 'the vice of both pleas is the same, that the breach goes only to part of the consideration.'<sup>98</sup> Yet Crompton J then cited *Hoare*, and noted that in that case 'we must take it that time was of the essence of the contract.'<sup>99</sup> At this point Blackburn J interjected that the 'reasoning of the Judges in that case does not apply to the plea pleaded to the second count', and that it appeared from the report that the second count was forgotten.<sup>100</sup> In *Hoare* the second count concerned the quantity of the goods; the first count concerned the time issue. This would give the impression that Blackburn J was supporting Crompton J's argument that *Hoare* demonstrated that time was at the root of the contract. However, to restrict *Hoare* in such a fashion was misleading: there was clearly some considerable judicial consideration of the quantitative aspects in *Hoare*, and this appears to be recognised by Crompton J: '[w]e must consider that the *breaches* alleged in the *pleas* in that case went to the root of the matter.'<sup>101</sup>

The authority of *Hoare*, following its "explanation" in *Jonassohn*, would cause confusion.<sup>102</sup> The potential for quantitative defects to be sufficiently serious to go to the root

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<sup>96</sup> (1863) 4 B & S 296, 300; 122 ER 470, 473.

<sup>97</sup> Ibid.

<sup>98</sup> Ibid.

<sup>99</sup> Ibid.

<sup>100</sup> Ibid.

<sup>101</sup> Ibid. (emphasis added).

<sup>102</sup> There is evidence of differing perspectives as to the relationship between *Hoare* and *Jonassohn* in contemporary practitioner journals. See e.g. 16 *Solicitors' Journal & Reporter* (1872), 731: 'We cannot but think that the decision in *Jonassohn v. Young* was a somewhat narrow and unreasonable one, and that the tendency of the Exchequer decisions is more in accordance with justice and requirements of business and convenience.' This distinction between the law and equity courts was followed up in 17 *Solicitors' Journal &*

of the contract, glimpsed in Crompton J's analysis, could not stand against Blackburn J's somewhat inaccurate construction of *Hoare*; *Hoare* would become authority for chronological defects alone.<sup>103</sup> It is perhaps unsurprising that Benjamin was unable to provide a clear exposition of the authority underpinning his proposition as to the effect of short delivery, as the judges themselves were having difficulty in reconciling the different cases, and consequently the various strands of authority would be entangled further.<sup>104</sup> In his second edition, Benjamin considered the judicial criticism of *Hoare* in the context of performance of the contract,<sup>105</sup> but failed to provide any personal observations on the impact of this judicial criticism other than noting that the criticism was particularly evident in *Simpson v Crippin*.<sup>106</sup>

In *Simpson* a strong Court of Queen's Bench (Blackburn, Mellor, and Lush JJ) had to deal with an instalment contract for the sale of 6000 to 8000 tons of coal, to be delivered by the defendant to the plaintiffs' wagons in equal monthly instalments over a 12 month period. For the first instalment the plaintiffs were only able to provide wagons for some 158 tons. Following this, the defendants attempted to annul the contract; the plaintiffs refused this annulment, so the defendants refused to deliver any more coal. It was held that the plaintiffs' acceptance of a short quantity did not entitle the defendants to terminate the contract. Interestingly, this was a majority decision: Mellor J was unable to distinguish the case before him from that in *Hoare*, and as such thought that that judgment should be given effect.<sup>107</sup> Yet Mellor J still felt able to agree with Blackburn J,<sup>108</sup> who (unsurprisingly) held *Hoare* was

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*Reporter* (1873), 219, 219-20, where the anonymous author also raised the question of leaving cases of non-performance of one of a series of acts to a jury to decide whether such non-performance made future performance 'a practically different thing from that original contemplated' (with the implication that it should be a jury question). I would like to thank the anonymous reviewer for pointing out these articles.

<sup>103</sup> Cf. text accompanying n 181.

<sup>104</sup> Cf. S.J. Stoljar, *A History of Contract at Common Law*, Canberra, 1975, 177, suggesting the distinction between *Hoare v Rennie* and *Jonassohn v Young* is explicable as the former constituted a wrong delivery at the outset (and was thus a 'rejectable performance') whereas the latter, being a wrong delivery in the course of the contract, would only go to part of the consideration. This in turn is justifiable as 'a seller would have to invest sometimes heavily in the preparation of future deliveries, [and so] a rule of strict performance could cause him a loss out of all proportion to any possible damage to the other side.' However, this approach only concerns one particular type of situation, and cannot be satisfactory for buyers. It also fails to fully explore the complicated story of those particular cases. More useful is Stoljar's strong implication that this distinction can be connected to developments concerning employment contracts (and other service-based contracts, such as charterparties). This relationship can be felt in the modern law (see Thomas, 'The right to reject for short delivery and termination', 57-58), but for the sake of clarity this article will focus on sale-specific judicial reasoning.

<sup>105</sup> Benjamin, *Sale of Personal Property*, 2nd ed., 481-483.

<sup>106</sup> (1872) LR 8 QB 14; 21 WR 141.

<sup>107</sup> *Ibid.*, 17.

<sup>108</sup> *Ibid.*: 'I agree generally with what my Brother Blackburn has said'. At 21 WR 141, 142: 'I have only one point of difference from my brother Blackburn.'

wrongly decided.<sup>109</sup> Lush J appeared to suggest *Hoare* was correct, but inapplicable as it had been solely concerned with the time of delivery.<sup>110</sup> All three did say though that they did not understand the decision in *Hoare*.<sup>111</sup> Oddly, Blackburn J referred to the fact that *Hoare* had been ‘questioned’ in *Jonassohn*: it is true that there was some questioning of *Hoare* in *Jonassohn* – by Blackburn J himself – but the really questionable authority was actually *Jonassohn*. Furthermore, *Simpson*, which involved a seller willing to deliver but prevented by the buyer’s inaction, could easily have been distinguished from *Hoare*, which involved a short delivery. But this passed the judges by. Blackburn J’s unreasoned analysis of *Hoare* is unhelpful. Mellor J appeared to conflate short delivery and failure to accept, and Lush J ignored the quantity aspect. These difficulties are aggravated by the short judgements handed down. This judicial confusion, compounded by the otherwise stellar quality of the judges in *Simpson* (all recognised masters of commercial law), is intensely difficult to comprehend, but if they were following Benjamin’s limited analysis it could only have been expected.

Following the chaos wrought by the Queen’s Bench in *Simpson*,<sup>112</sup> the Court of Common Pleas soon came up with an alternative formulation for dealing with short deliveries in *Freeth v Burr*.<sup>113</sup> There the defendant sold 250 tons of pig iron to the plaintiffs, half to be delivered in two weeks, the remainder two weeks later. Payment was by cash two weeks after delivery. Despite the plaintiffs’ demands, the first delivery was not completed for nearly six months. The plaintiffs refused to pay, claiming a set-off in respect of money spent in purchasing alternative goods in a rising market, though they still wanted delivery of the second portion. The defendant took the refusal to pay as a breach and abandonment of the contract, and refused to deliver the remainder. It was held that the plaintiffs’ refusal to pay did not, in the circumstances, warrant the defendant treating the contract as abandoned. For

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<sup>109</sup> Ibid.

<sup>110</sup> Ibid., 17-18.

<sup>111</sup> Ibid., 17 (Blackburn J): ‘It is, however, difficult to understand upon what principle *Hoare v. Rennie* was decided.’ Mellor J: ‘I think that it is difficult to reconcile *Hoare v. Rennie* with some of the other cases which have been cited’. Lush J: ‘I cannot understand the judgments in *Hoare v. Rennie*.’ The report at 21 WR 141, 142 differs considerably. Lush J states: ‘I cannot understand upon what principle *Hoare v. Rennie* was decided.’ Mellor J: ‘I think that *Hoare v. Rennie* cannot be distinguished from the case before us’. Blackburn J: ‘the contract in [*Hoare*] ... was different ... if I could see the principle of that decision was right, I should feel myself bound by it’. This apparent hardening of opinion in the Law Reports is difficult to explain.

<sup>112</sup> It is interesting to note the comment in 17 *Solicitors’ Journal & Reporter* (1873), 219, 220: ‘The case of *Simpson v. Crippin* will no doubt be carried to the Exchequer Chamber, where we may expect some authoritative decision to be arrived at.’ This could be founded on comments reported at 21 WR 141, 142 (Blackburn J): ‘If we are wrong, the Court of Appeal will correct our decision’; Mellor J: ‘I give judgement for the defendants ... and grant leave to the plaintiffs to take the question before the Exchequer Chamber.’ There was no appeal though.

<sup>113</sup> (1874) LR 9 CP 208.

Lord Coleridge CJ, ‘the real matter for consideration is whether the acts or conduct of [one party] do or do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract.’<sup>114</sup> Thus ‘non-payment on the one hand, or non-delivery on the other, may amount to such an act, or may be evidence for a jury of an intention wholly to abandon the contract and set the other party free.’<sup>115</sup> This explained the true basis of *Hoare* and *Jonassohn*: ‘The principle to be applied in [*Hoare* and *Jonassohn*] is, whether the non-delivery or the non-payment amounts to an abandonment of the contract or a refusal to perform it on the part of the person so making default.’<sup>116</sup>

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<sup>114</sup> *Ibid.*, 213.

<sup>115</sup> *Ibid.* The reference to jury decisions was picked up by the anonymous author of ‘The Rescission of Contracts of Sale of Goods’, 51 *The Law Times* (1874), 248, who argued that such cases should be left ‘entirely to the jury’. This is similar to contemporary arguments about the role of the jury in such cases (see n 102), but it can be questioned whether such analysis unnecessarily side-stepped the issue of characterisation of the consequences of short delivery of entire contracts (see n 183). It is interesting to note that the text in the quotation is not uniformly reported. In (1874) 43 LJCP 91, 93, the equivalent portion of Lord Coleridge CJ’s judgement is: ‘the true principle which governs them all [i.e. cases following *Jonassohn*] is whether the act relied on as a rescission of the contract amounts to a refusal by the person doing the act to perform his part of the contract.’ In (1873-74) 29 LT 773, 775: ‘the true principle running through all [cases] is this – viz., is the act to be relied on as rescission an act which on the part of the person doing it amounts to an abandonment, or refusal by him to perform his part of the contract?’ In (1874) 22 WR 370, 371: ‘the true question is, whether when one party claims to be set free by the action of another party, the action of that other party amounts to an affirmative assertion of his abandonment. Non-payment on one side, or non-delivery on the other, may amount to such an act or assertion, or, at all events, it may afford sufficient evidence of such an intention to go to a jury – that is to say, it may justify a judge in holding, or a jury in finding, that such an act amounts to an indication [of intent to abandon the contract].’ Whilst it must be admitted that the official report suggests this is a jury question, the variety in the different reports raises questions about the use of ‘may’ in the official report, i.e. whether the question really was solely for a jury or whether a judge could direct on this point (cf. Denman J, at 22 WR 370, 371: ‘what [Brett J ruled at first instance amounted to]: if you (the jury) think that the refusal to pay for the first parcel under all the circumstances amounted to a manifestation of intention to consider the whole contract at an end so far as he, the plaintiff, was concerned, then the defendants are entitled to your verdict.’). The discussion of the report in the Weekly Reports in the anonymous article ‘Exoneration from performance of a contract by default of the other contracting party’, 18 *Solicitors’ Journal & Reporter* (1874), 604, 605 suggests the effect is merely that ‘[i]n short, though mere non-performance is not repudiation, yet it may be evidence of repudiation [which]... would lay down an intelligible rule [though]... it will not suffice to reconcile all the cases; but since the cases are at present admitted to be irreconcilable this cannot be regarded as forming any objection to it.’

<sup>116</sup> (1874) LR 9 CP 208, 214. See also Keating J: the ‘mere refusal or omission of one of the contracting parties to do something which he ought to do, that will justify the other in repudiating the contract; but there must be an absolute refusal to perform his part of the contract.’ Very soon after this case came *Anderson v Morice* (1874-75) LR 10 CP 58; 44 LJ CP 10 (Common Pleas); (1874-75) LR 10 CP 609; 44 LJ CP 341 (Exchequer Chamber); (1875-76) LR 1 App Cas 713; 46 LJ QB 11 (House of Lords). *Anderson* does not provide much in the way of development of the doctrine on short delivery. This is because although *Anderson* involved a short delivery, the key question was whether there was an insurable interest at the point at which the ship sank. There was confirmation of the basic rule that a buyer following a short delivery only has the opportunity to exercise his option between rejection and acceptance once the delivery is complete; Brett J in the Court of Common Pleas made the obiter point, in line with *Freeth v Burr*, that if the buyer took the option to reject then he could ‘have treated himself as not bound by the contract ... [and could] disclaim the contract’: (1874-75) LR 10 CP 58, 73-74; 44 LJ CP 10, 18. In *Colonial Insurance Co of New Zealand v Adelaide Marine Insurance Co* (1886) LR 12 App Cas 128 (PC) (following *Oxendale v Wetherell*) *Anderson v Morice* was distinguished on the facts (relating to the nature of the vendors obligations; otherwise the two cases were incredibly similar). The Privy Council held there was an insurable interest held by the buyer, which was ‘defeasible, not by the vendors, but at the

Within five years *Hoare* would receive further judicial analysis from the Court of Appeal in *Honck v Muller*,<sup>117</sup> but in the intervening period the Court of Appeal would consider *Reuter, Hufeland & Co v Sala & Co*.<sup>118</sup> *Reuter* concerned the non-acceptance of goods: the contract was for 25 tons of pepper, but five tons were not shipped during the contracted period. The Court, affirming the judgement of Lord Coleridge CJ at first instance, held that the contract was entire, and thus the buyers were not bound to accept the short delivery. Interestingly, this is the only short delivery case that Benjamin appeared to be involved with; he represented the unsuccessful sellers. The Law Journal report provides details as to counsels' arguments,<sup>119</sup> where the claimants argued, in addition to the main point that this was a divisible contract, that if the defendants accepted the short delivery they could claim damages, 'but they are not entitled to rescind the contract altogether – *Simpson v. Crippin*.'<sup>120</sup> This was naturally denied by the defendants: 'this is [not] a severable contract within the class of cases to which *Simpson v. Crippin* belongs.'<sup>121</sup> Thesiger LJ held that the quantity was of the essence of the contract, and thus *Reuter* could be distinguished from *Simpson* where, unlike in *Reuter*, 'the parties might well be assumed to have contemplated a payment in damages rather than a rescission of the whole contract.'<sup>122</sup> He also discussed the 'practical absurdity' that would result if all short deliveries or non-acceptances were solely remediable by damages.<sup>123</sup> Cotton LJ agreed with Thesiger LJ as to the non-divisibility of the contract.<sup>124</sup> Brett LJ dissented. He referred to *Jonassohn v Young* and *Simpson v Crippin*, and, following Blackburn J in *Simpson*, concluded that 'no sufficient reason has been shewn why damages would not be a compensation for the breach'.<sup>125</sup> For Brett LJ, the 'general principle to be deduced' from *Jonassohn* and *Simpson* is that in a 'mercantile' sales contract by instalments, the 'failure of the seller or buyer to fulfil his part in any one or more of those deliveries does not absolve the other party from the duty of tendering or accepting in the case

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option of the vendees in the event of the vendors not completing the contract' (Sir Barnes Peacock, at 140). This conclusion clearly depends on intent: see e.g. Sarah Worthington, 'Passing of Property', in E McKendrick, ed., *Sale of Goods*, London, 2000, para. 2-038.

<sup>117</sup> (1881) 7 QBD 92; 50 LJQB 529; 45 LT 202; 29 WR 830.

<sup>118</sup> (1879) 4 CPD 239; 48 LJQB 492; 40 LT 476; 27 WR 631.

<sup>119</sup> The reports correspond as to the judgement of the Court.

<sup>120</sup> 48 LJQB 492, 494.

<sup>121</sup> *Ibid.*

<sup>122</sup> (1879) 4 CPD 239, 246.

<sup>123</sup> *Ibid.*, 247.

<sup>124</sup> *Ibid.*, 250

<sup>125</sup> *Ibid.*, 255.

of other subsequent deliveries’,<sup>126</sup> on the grounds that ‘only part of the consideration’ is breached, and that such a breach ‘can be compensated in damages without any necessity for annulling the whole contract’.<sup>127</sup>

In 1881 the Court of Appeal decided *Honck v Muller*.<sup>128</sup> In October 1879 the plaintiff purchased 2000 tons of pig iron (at 42s per ton) from the defendant, to be delivered either in November 1879, or for an additional cost (6d per lb) in November, December and January 1880 in equal proportions. After failing to take delivery in November, the plaintiff demanded one third in December and one third in January. The defendant refused to deliver this lesser amount, and claimed the contract was cancelled by the plaintiff’s breach in failing to take any iron in November. The Court of Appeal was divided: Bramwell and Baggallay LJ held in favour of the defendant; Brett LJ dissented.

Bramwell LJ considered that the plaintiff’s claim that he was entitled to demand delivery despite failing to take the initial delivery was ‘contrary to law and justice alike ... where no part of a contract has been performed, and one party to it refuses to perform the entirety to be performed by him, the other party has a right to refuse to perform any part to be performed by him.’<sup>129</sup> After providing some hypothetical examples, which, confusingly, concerned examples of the buyer refusing to accept and the seller refusing to deliver,<sup>130</sup> Bramwell LJ noted that for cases including short delivery, the buyer would not be obliged to perform (i.e. pay) for that part that is missing, but would be obliged to perform (i.e. pay) in correspondence to that part actually done.<sup>131</sup> Bramwell LJ thought that *Hoare* was ‘in point’ and ‘quite right’: it was not correct to say that *Simpson* had overruled *Hoare*.<sup>132</sup> As to the failure of the judges in *Simpson* to understand *Hoare*, Bramwell LJ said ‘[o]ne may express a

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<sup>126</sup> Ibid., 256.

<sup>127</sup> Ibid., 257.

<sup>128</sup> (1881) 7 QBD 92. The reports at 50 LJ QB 529 and 29 WR 830 are essentially the same. *Honck v Muller* appears to share the same jurisprudential foundation as *Johnson v Agnew* [1980] AC 367, which re-established the orthodoxy on the relationship between rejection and rescission, which is central to the modern issue: Thomas, ‘The right to reject for short delivery and termination’. However, *Honck* was not cited in *Johnson* either in judgement or argument before the House of Lords or the Court of Appeal ([1978] 1 Ch 176).

<sup>129</sup> (1881) 7 QBD 92, 98. As Epstein, ‘For a Bramwell Revival’, 249 notes, ‘[t]he bedrock assumption in Bramwell’s world view was that voluntary arrangements between individuals should be enforced by the law without regard to the substantive terms of the agreement.’ This goes a long way to explaining Bramwell’s position here on short delivery.

<sup>130</sup> (1881) 7 QBD 92, 98-99.

<sup>131</sup> Ibid., 99. This is the approach taken by Parke B in *Oxendale*, see above text following n 21.

<sup>132</sup> Ibid., 100. He also said ‘The same thing [as *Hoare*] was decided a few days ago in *Englehart v Bosanquet* [an unreported decision]. It was there held that on a sale of 2000 tons of sugar to come in two ships when the first ship was not equal to contract, the buyer was not bound to take the other.’



respectful agreement’:<sup>133</sup> this is not quite the same though as admitting an equivalent lack of understanding, and what limited explanation of *Hoare* that Bramwell LJ gave suggests he had a firmer grasp of the case-law.<sup>134</sup> Similarly, Baggallay LJ thought it ‘impossible to reconcile’ *Simpson* with *Hoare*, except as indicated by Bramwell LJ, though he disagreed with Bramwell LJ’s conclusion about their factual distinction (following Mellor J’s inability in *Simpson* to distinguish *Hoare*).<sup>135</sup> For Baggallay LJ the correct interpretation was actually given in *Hoare*.<sup>136</sup>

Brett LJ dissented, for it seemed to him ‘not that [the judges] meant to say [in *Simpson*] they did not understand *Hoare v Rennie*, but that they could not understand that the principle of law was rightly applied there. In other words, they meant to say they differed from *Hoare v Rennie*. So do I...’; *Hoare* was wrongly decided.<sup>137</sup> He thus took a pragmatic approach to the problem: because the claim was for non-delivery, ‘the question is whether the failure of the plaintiff to take the first delivery prevents him from requiring a delivery at the two successive periods.’<sup>138</sup> Following from his reasoning in *Reuter*,<sup>139</sup> this type of contract was one which involved successive deliveries at a sum per measure, so ‘inasmuch as the failure to perform one of the deliveries can be satisfied by damages, the failure in respect of one delivery does not prevent the party from having the other deliveries.’<sup>140</sup> Courts interpret a mercantile contract ‘in the way in which reasonable business men, in the ordinary course of business, would apply it’.<sup>141</sup> So where merchants had agreed to separate the price such that failure of delivery could be adequately remedied by damages, the merchant’s intention was clearly not ‘that such non-delivery should put an end to the contract and prevent the party so failing from having a right to make subsequent deliveries.’<sup>142</sup>

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<sup>133</sup> (1881) 7 QBD 92, 100.

<sup>134</sup> This may be explained by Bramwell’s willingness to fully research the case-law: ‘I read what I suppose you may call the orthodox reports of the three Common Law Courts, namely Ellis and Blackburn, the Common Bench Reports, and Hurlstone and Norman, I read the *Law Journal* reports, Equity and Common Law, and I read the *Jurist* reports. I read over the same case very often three times ...’: cited in John MacDonnell, ‘Lord Bramwell, A Sketch’, 108 *Temple Bar* (1896), 486, 506, cited by Anita Ramasastry, ‘The Parameters, Progressions and Paradoxes of Baron Bramwell’, 38 *American Journal of Legal History* (1994), 322, 342.

<sup>135</sup> (1881) 7 QBD 92, 102 (though cf above n 111).

<sup>136</sup> *Ibid.*: ‘I adopt the principles enunciated in [*Hoare*] as being more in accordance with reason and justice than those upon which the former was expressed to be decided. The principles upon which that case was decided are so clearly expressed in the reported judgments, that I need not refer to them in detail.’

<sup>137</sup> *Ibid.*, 105.

<sup>138</sup> *Ibid.*, 103.

<sup>139</sup> Although *Reuter* was cited in argument ((1881) 7 QBD 92, 96), it was not mentioned in the judgement.

<sup>140</sup> (1881) 7 QBD 92, 103.

<sup>141</sup> *Ibid.*

<sup>142</sup> *Ibid.*, 104.

*Honck* was swiftly followed by *Mersey Steel and Iron Co v Naylor*.<sup>143</sup> In *Mersey Steel* the defendants agreed to purchase steel, to be delivered on board in five monthly instalments beginning in January 1881, payment within three days of receipt of shipping documents. The first delivery was only about half the required amount for that month. The February delivery amounted to about a quarter of the requirements. The sellers were subjected to a winding-up petition prior to payment becoming due. The defendants refused to pay the sellers without leave from the Court. On February 10, the sellers replied to the defendants that this failure to pay released them from obligations to carry out the remainder of the contract. A week later, the defendants claimed damages for non-delivery, and said they were prepared to accept and pay for all further deliveries, and would probably be willing to accept the January instalment if it turned up and would waive the damages claim. The liquidator (the winding-up order having been made on February 15) refused to make further deliveries, and began an action for the price for that which had been delivered.

The Court of Appeal held that the defendants' postponement of payment (made under erroneous legal advice) did not show intent to no longer be bound by the contract. Thus the plaintiffs were liable for non-delivery. Sir George Jessel MR was of the broad opinion that *Hoare* was incorrect, and that *Simpson* was the more accurate statement of law.<sup>144</sup> Lindley LJ was more forthcoming about the case-law, stating that he could understand *Hoare*, *Simpson*, and *Honck* individually, but could not reconcile them.<sup>145</sup> Like Sir George Jessel MR,<sup>146</sup> (though more explicitly), he thought the best way to deal with the situation was to take the general principle enunciated by Lord Coleridge CJ in *Freeth v Burr*,<sup>147</sup> i.e. that '[t]he true question is whether the acts and conduct of the parties evince an intention no longer to be bound by the contract.'<sup>148</sup> Bowen LJ concurred with Lindley LJ's utilisation of Lord Coleridge's analysis,<sup>149</sup> thus giving the ratio set out at the outset of this paragraph. However, Bowen LJ also provided an obiter dictum indicating a shift in judicial thinking back toward the notion of breach (and the extent thereof) being the guiding idea in short delivery cases: 'Non-delivery of a single parcel would not be necessarily, of course, sufficient to intimate that the person who does not deliver intends no longer to be bound, but I am far from saying

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<sup>143</sup> (1882) 9 QBD 648; 31 WR 80; (1882) 9 AC 434.

<sup>144</sup> (1882) 9 QBD 648, 655 (arguendo); 658.

<sup>145</sup> *Ibid.*, 666: 'I have tried in vain to reconcile [them]'; cf 31 WR 80, 85: 'I have tried and I despair...'

<sup>146</sup> *Ibid.*, 657.

<sup>147</sup> (1873-74) LR 9 CP 208, 214.

<sup>148</sup> (1882) 9 QBD 648, 666.

<sup>149</sup> *Ibid.*, 670.

that non-delivery of a single parcel might not in particular contracts, and under particular circumstances, be sufficient.’<sup>150</sup> This subtle obiter would later be seen as a shift from assessment according to the parties’ intent to assessment according to the factual matrix as a whole.<sup>151</sup> Bowen LJ finished his analysis of this issue by rejecting Bramwell LJ’s formulation from *Honck*, that part performance prevents the termination of a contract.<sup>152</sup> He said that a

fallacy may possibly lurk in the use of the word “rescission.” It is perfectly true that a contract, as it is made by the joint will of two parties, can only be rescinded by the joint will of the two parties, but we are dealing here, not with the right of one party to rescind the contract, but with his right to treat a wrongful repudiation of the contract by the other party as a complete renunciation of it.<sup>153</sup>

The decision of the Court of Appeal was affirmed by the House of Lords.<sup>154</sup> There the Earl of Selbourne LC contented himself with Lord Coleridge CJ’s formulation from *Freeth*,<sup>155</sup> and reasoned that an examination of the contract is necessary ‘to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part.’<sup>156</sup> Thus on the facts the Lord Chancellor could not ‘ascribe to their conduct, under these circumstances, the character of a renunciation of the contract, a repudiation of the contract, a refusal to fulfil the contract. It is just the reverse; the purchasers were desirous of fulfilling the contract’.<sup>157</sup> Lord Blackburn was content with

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<sup>150</sup> Ibid.

<sup>151</sup> See e.g. *Cornwall v Henson* [1900] 2 Ch 298, 303-304 (Collins LJ): whatever the interpretation given to cases such as *Hoare*, *Honck* or *Simpson*, the effect of *Mersey Steel* is that ‘the law is now clear that the breach of one stipulation does not necessarily carry with it even an implication of an intention to repudiate the whole contract. It may do so if the circumstances lead to such an inference; but the further the parties have proceeded in the performance of the contract the less likely it is that by the breach of one stipulation by one party he should intend to declare his incapacity to perform the contract, or his intention not to carry it out.’

<sup>152</sup> (1882) 9 QBD 648, 670-671. Sir George Jessel MR came to the same conclusion (at 657-658).

<sup>153</sup> Ibid., 671. At 31 WR 80, 87 Bowen LJ states: ‘it seems to me that the confusion, if confusion there has been in this case, is to be accounted for by this, that the judges in the various cases have had to draw inferences from the particular facts in order to make up their minds whether the principle which I have read from *Freeth v. Burr* was really applicable.’ This rather stinging criticism is, perhaps unsurprisingly, absent from the Law Reports.

<sup>154</sup> (1882) 9 AC 434; 32 WR 989.

<sup>155</sup> Ibid., 438.

<sup>156</sup> Ibid., 439.

<sup>157</sup> Ibid., 441.

solving the issue with anticipatory breach,<sup>158</sup> but also stated the case came under the doctrine of *Freeth*.<sup>159</sup> He thought the argument that mere breach would suffice to end the contract was insufficient; the facts needed to be analysed to see if the breach went to the root of the contract.<sup>160</sup> For Lord Blackburn, both *Hoare* and *Honck* could be rationalised as cases where the necessity of delivery of the whole amount and no less went to the essence of the contract, and as such they stood by themselves but did not necessarily impact on the case before him.<sup>161</sup> Lord Bramwell followed, and appeared to agree with Lord Blackburn that *Hoare* and *Honck* were not relevant,<sup>162</sup> though his most interesting comment was his retraction of his point made in *Honck* that part performance would prevent termination, stating ‘If I did say so I recall it, because I do not think so; it depends on the nature of the contract and the circumstances of the case.’<sup>163</sup> What he said he had been trying to do in *Honck* was show that the plaintiff had been trying to make the defendant accept something ‘entirely different from what had been agreed upon’.<sup>164</sup>

The confusing and complex run of cases through to *Mersey Steel* shows the meandering development of the doctrine on short delivery. The initial possibility that short delivery was itself a *per se* total failure of consideration fell away; however, short delivery could result in termination, but only if in the factual context the short delivery went to the root of the contract.<sup>165</sup> However, this approach in turn partially collapsed,<sup>166</sup> into an assessment of the parties intentions (as to whether the agreement was abandoned and the contract repudiated). It had become unclear as to whether the buyer’s choice to reject the goods would necessarily terminate the contract, or whether the buyer had to make an additional choice (following rejection) to terminate. These problems would not be clarified by the SGA 1893.

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<sup>158</sup> Ibid., 442-443.

<sup>159</sup> Ibid., 443.

<sup>160</sup> Ibid., 444.

<sup>161</sup> Ibid., 444-445.

<sup>162</sup> Ibid., 446.

<sup>163</sup> Ibid., 446. It is of course quite clear that he did say such a thing; the report at 32 WR 989, 992 has the more revealing statement: ‘If I did say so I recant, I recall it, because I do not think so.’

<sup>164</sup> Ibid., 447.

<sup>165</sup> Cf. *Francis v Lyon* (1907) 4 CLR 1023: following a sale of 6600 sheep it was accepted that the buyer was entitled to reject 448 sheep. However, the buyer went further, and refused to accept 778 sheep. It was held that the seller could not terminate the whole contract, because the buyer’s refusal was not a breach that went to the root of the contract.

<sup>166</sup> Unsurprising in the historical context of the prevailing jurisprudential ideology of the will theory of contract: Ibbetson, *Historical Introduction to the Law of Obligations*, ch 12; Michael Lobban, ‘Part Two: Contract’, 300-313. See also *Bank Line Ltd v Arthur Capel & Co* [1919] AC 435, 459 (Lord Sumner): ‘The phrase “goes to the root of contract,” like most metaphors, is not nearly as clear as it seems.’

### 3. *The Sale of Goods Act 1893, section 30*

Sir Mackenzie Chalmers' 1890 text *Sale of Goods, including The Factors Act, 1889*,<sup>167</sup> drawn almost completely from the Sale of Goods Bills of 1888 and 1889 (which had been drafted by Chalmers and, to a lesser extent, Lord Herschell),<sup>168</sup> was in effect a draft of the 1893 Act. It provided the structural foundations and conceptual basis for the 1893 legislation, as well as operating (to a large extent) as a justificatory argument for the implementation of a code for sales of goods.<sup>169</sup> Yet Chalmers had very little to say about the right to reject for short delivery and its relationship with termination. This may have been because Chalmers was intending on merely producing a statement of 'concisely the general principle of law peculiar to the sale of goods' rather than a comprehensive account (on which point, Chalmers refers to Benjamin's 'exhaustive work').<sup>170</sup> It may also have been a result of the 'fortuitous character of English law', which meant some points were replete with authority whilst others suffered a 'curious dearth of authority'.<sup>171</sup> It may, however, have simply been because Chalmers did not read anything other than Benjamin's passage on short delivery, though if Chalmers had also read Pothier on short delivery he could not have drawn any more than from Benjamin.<sup>172</sup>

The key passage on short delivery in his 1890 text is a recitation of the relevant clause of the bill, and states: 'Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he must pay for them at the contract rate.'<sup>173</sup> This is, of course, no different from what actually ended up in the SGA 1893, s. 30(1).<sup>174</sup> In support of this proposition Chalmers

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<sup>167</sup> HH Judge Chalmers, *Sale of Goods, including the Factors Act, 1889*, London, 1890.

<sup>168</sup> Ibid., iii-iv. In the next edition, Chalmers described the 1890 text as 'in substance a commentary on the Sale of Goods Bill': Chalmers, *The Sale of Goods Act*, 2nd ed., iii.

<sup>169</sup> Chalmers, *Sale of Goods*, v: 'It needs no argument to prove that in matters of this kind [sale] legislation is cheaper and speedier than litigation.' See generally M.D. Chalmers, 'An Experiment in Codification', 2 *Law Quarterly Review* (1886), 125; 'Codification of Mercantile Law', 19 *Law Quarterly Review* (1903), 1, 10-18.

<sup>170</sup> Chalmers, *Sale of Goods*, iii. See also Law Commission and Scottish Law Commission, *Sale and Supply of Goods* (Law Com 160, Scot Law Com 104, 1987) para 1.5: '[w]hat Chalmers sought to do was to prepare a statement in statutory form of the principles of law derived from decided cases.' See further R.B. Ferguson, 'Legal Ideology and Commercial Interests: The Social Origins of the Commercial Law Codes', 4 *British Journal of Law and Society* (1977), 18, 21, 31-32 (compared to the Bills of Exchange Act 1882, the SGA 1893 involved very little pressure from commercial interests), 22-26 (noting the importance of certainty and conservatism on the face of codification proposals, though Ferguson later demonstrates that in general these claims cannot be substantiated).

<sup>171</sup> Chalmers, *Sale of Goods*, v-vi.

<sup>172</sup> See above n 73 and accompanying text.

<sup>173</sup> Ibid., 49. The relevant clause is numbered 33.

<sup>174</sup> The lack of change between the proposal and the eventual statutory provision suggests an alternative explanation is required for the short delivery provision to that suggested by Mitchell in his analysis of the quality obligations: Paul Mitchell, 'The development of quality obligations in sale of goods', 117 *LQR* (2001), 645, 659-61, noting that the quality obligations as they stood prior to codification were then mutilated during the

provides citations to four cases (one of which was an approval of the other): *Shipton v Casson*,<sup>175</sup> *Oxendale v Wetherell*,<sup>176</sup> (as approved in *Colonial Insurance Co v Adelaide Insurance Co*),<sup>177</sup> and *Morgan v Gath*.<sup>178</sup> Whilst these cases do support the general proposition put forward by Chalmers, they do so in such a general fashion, that, combined with Chalmers' failure to connect the right to reject with termination, very little can be drawn from this. And that is the extent of Chalmers' analysis of this issue. The next edition of his text, which appeared following the promulgation of the SGA 1893, failed to add anything to the initial analysis.<sup>179</sup>

Chalmers' failure to explain what is meant by rejection in short delivery cases restricted any attempt to elucidate the consequences of rejection for short delivery. As Stoljar wrote: the 'misunderstanding' of the role of failure of consideration in sales 'affected the whole structure of Chalmers' codification ... had Chalmers fully understood the curious developments which had taken place, failure of consideration would certainly have been given a much more central place in his scheme, the main defect of which precisely is that it neglects the right of restitution (rejection, etc.) compared with the right to damages'.<sup>180</sup> This misunderstanding could have been the result of Chalmers reading Benjamin's discussion of short delivery in isolation from his discussion of failure of consideration, and in isolation from the actual judicial history.

An alternative explanation can also be given: the decisions in *Hoare v Rennie*, *Jonassohn v Young*, *Simpson v Crippin*, *Honck v Muller*, *Freeth v Burr*, and *Mersey Steel and*

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Bill's progress through Parliament. As Mitchell notes, at 660 fn 98, the Select Committee's Report on the Bill is practically useless.

<sup>175</sup> (1826) 5 B & C 378; 108 ER 141.

<sup>176</sup> (1829) 4 Man & Ry 429. It is worth briefly noting that this citation, which Chalmers provides, is different from the usual citation ((1829) 9 B & C 386; 109 ER 143). This is particularly odd since Chalmers notes that *Oxendale* is approved in the *Colonial Insurance* case, where there the reference is to the Barnewall and Cresswell reports. Nevertheless, there is no substantive difference between the two reports.

<sup>177</sup> (1886) LR 12 App Cas 128, 138.

<sup>178</sup> (1865) 34 LJ Ex 165.

<sup>179</sup> See Chalmers, *Sale of Goods Act, 1893*, 2nd ed., 62-63. Henry Aitken, *The Principles of the Law of Sale of Goods*, Edinburgh, 1921, like the other texts, merely states (citing SGA 1893, s. 30(1)) that the seller 'must deliver to the buyer the quantity of goods sold, no more and no less. If he delivers less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he must pay for them at the contract rate.' The only case cited is *Shipton, Anderson & Co v Weil Brothers & Co* [1912] 1 KB 574 (requiring more than a trifling excess or deficiency for SGA 1893, s. 30(1) to operate). Later on, at 106, Aitken provides a valuable indication of the impact of the structure of the SGA 1893 in terms of conditions and warranties had on delivery questions: 'It appears, therefore, that the mere failure to deliver, or mere failure to take delivery and pay for one instalment, does not give the other party the right to throw up the remainder of the contract. There must be more than this. The party in default must, by his words or actions, indicate that he does not intend to carry out the remaining part of the contract according to its terms.' Following this, Aitken replicates a part of Lord Selborne LC's speech in *Mersey Steel*, noted above at text accompanying n 155.

<sup>180</sup> Stoljar, 'The Doctrine of Failure of Consideration', 76 fn 25.

*Iron Co v Naylor* were provided by Chalmers as authority for and examples of the rule on instalment deliveries in SGA 1893, s. 31(2).<sup>181</sup> This provision deals with ‘stated instalments, which are to be separately paid for’; if the seller makes ‘defective deliveries’ of one or more instalments, then whether there is cancellation of the whole contract depends on ‘the terms of the contract, and the circumstances of the case’. *Mersey Steel* was given as the primary authority; the other cases noted above were provided as authorities for Chalmers’ commentary on s. 31(2).<sup>182</sup> Thus for instalment deliveries, short delivery only leads to termination if the facts require such a conclusion. However, s. 30(1) does not require such contextualisation, and so it may be possible to draw a different conclusion for short deliveries of entire contracts. Since the cases noted above were instalment deliveries, their capacity to provide guidance for entire contracts is questionable. However, the case-law does not indicate any explicit delineation between the two types of short delivery. It is intriguing why such an easy task was not undertaken. Furthermore, it is questionable whether Chalmers’ attempt to reconcile *Hoare* and *Honck* on one side and *Jonassohn*, *Simpson*, and *Freeth* on the other is successful: he argued that such cases should simply be determined according to their merits.<sup>183</sup> Such an approach would fail to resolve the fundamental issue of the characterisation of the consequences of short delivery in entire contracts.

At this point it is worth reflecting on a significant difficulty concerning the actual impact of Benjamin’s text. None of the cases mentioned actually refer to Benjamin, which is curious in light of the text’s obvious general impact, and because in contrast to the usual reluctance of English judges to refer to living authors at the time,<sup>184</sup> Benjamin was cited by judges.<sup>185</sup> Furthermore, whilst Chalmers noted his debt to Benjamin, his most effusive praise

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<sup>181</sup> SGA 1979, s. 31(2) is identical.

<sup>182</sup> Chalmers, *Sale of Goods Act, 1893*, 2nd ed., 63-64.

<sup>183</sup> *Ibid.*, 64. Cf above n 115. See also 17 *Solicitors’ Journal & Reporter* (1873), 219, 220, and ‘The Rescission of Contracts of Sale of Goods’, 51 *The Law Times* (1874), 248, where both anonymous authors state that such cases should be left to a jury. It is worth noting that whilst a number of the cases discussed herein turned on a jury decision, they did so on matters of fact. Thus *Oxendale v Wetherall* turned on a jury deciding the contract was entire: see n 21; *Levy v Green* involved a jury determining the importance of time of delivery ((1857) 8 E & B 575, 577; 120 ER 214, 216-17); and *Morgan v Gath* turned on a jury determination that there was acceptance: see n 64. However, the issue of the characterisation of the consequences of short delivery was a point of law, and thus not for juries to decide. Whilst the decline in civil jury trial, which begun in earnest by the mid-nineteenth century, was much more gradual towards the turn of the nineteenth century (Conor Hanly, ‘The Decline of Civil Jury Trial in Nineteenth-Century England’, 26 *The Journal of Legal History* (2005), 253, 277-78), the suggestions of the authors noted above would have been a retrograde step. Indeed, whilst *Simpson v Crippin* resulted from a jury trial (before Lush J at the Liverpool Spring Assizes), in *Freeth v Burr* the case started before a special jury (before Brett J at Guildhall), and by *Reuter, Hufeland v Sala* the trial was before Lord Coleridge CJ without a jury (as was the case in *Mersey Steel v Naylor*).

<sup>184</sup> This is not as clear cut as if often thought, but the general point suffices here.

<sup>185</sup> See e.g. *In Re Wordsell* (1877) 6 ChD 783, 789 (Bacon CJ).

was reserved for Pothier. This can perhaps be explained as a result of the late 19th century intellectual climate of contract scholarship: the vogue for Pothier, which had been growing for some time, was considerable. Yet Chalmers' debt to Benjamin on the point of short delivery, though not overt, is obvious: the same structure, phraseology and references to authorities can only be interpreted one way. Arguably it is in this respect that Benjamin's influence is most clear, and most profound, even if, as noted above,<sup>186</sup> Benjamin may have just been following Pothier. What then of the lack of judicial reference to Benjamin? Recent work on the impact of non-judicial commentary on the development of doctrine illustrates the problems that can occur from inaccurate intellectual borrowing.<sup>187</sup> Certainly, the influence of doctrinal treatise and commentaries on the legal profession can be profound.<sup>188</sup> Indeed, it is even possible to argue that the very aesthetics of non-judicial writing can have an impact on how the law is perceived by practitioners.<sup>189</sup> The importance of the form of non-legislative or non-judicial work is an underrated aspect of the claims to authority of such work (be it codification or more of an academic exercise).<sup>190</sup> The influence of the formal structural framing of a particular decision can easily be observed in the discussions of *Hoare v Rennie*, *Jonassohn v Young*, and *Simpson v Crippin*. But it may also be suggested that the particular structure adopted first by Benjamin, and then by Chalmers, as to the rules on short delivery, combined with the reification of the quadrumvirate of *Waddington v Oliver*, *Oxendale v Wetherell*, *Hoare v Rennie*, and *Morgan v Gath*, had a peculiar dual effect on understanding of short delivery doctrine. On the one hand, the reified cases were ignored as to their actual effect and impact, and on the other hand other relevant analyses were totally ignored. Furthermore, the failure to explicitly distinguish short delivery of entire contracts and failures of instalment contracts may have prevented clarification of the characterisation of the consequences of a short delivery. It may thus still be suggested that the similarity between the

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<sup>186</sup> Text following n 72.

<sup>187</sup> Such as the late nineteenth century attempts to graft civilian theories onto English contract law, for which see e.g. Ibbetson, *Historical Introduction to the Law of Obligations*; Michael Lobban, 'Part Two: Contract'; MacMillan, *Mistakes in Contract Law*.

<sup>188</sup> See e.g. Nils Jansen, *The Making of Legal Authority: Non-legislative Codification in Historical and Comparative Perspective*, Oxford, 2010.

<sup>189</sup> Ibid., 90-91: 'Another form of non-legislatively authoritative legal text is a compilation: a rearrangement of individual statutory norms of independent prior authority. Compilations put a number of individual, historically and intellectually unrelated expressions of the sovereign's will or other texts of authority into an orderly system, yet without any thorough doctrinal 'translation'. Nevertheless, such a compilation may achieve a significance that goes far beyond making the law more easily accessible: compilations may fundamentally reshape a legal system.'

<sup>190</sup> Ibid., ch 4.



judicial formulations of the doctrine on short delivery and what Benjamin wrote is indicative of some influence.

#### 4. *Operation of the Sale of Goods Act 1893, section 30 provisions*

The impact of the lack of clarity over the meaning of the right to reject for short delivery may not have been immediately apparent, due to greater precision in contractual drafting. So in *Pool Shipping v London Coal Co of Gibraltar*, a short delivery occurred because of an unexpected rise in demand. A contractual term concerning events preventing the ‘normal working of contract’ was held sufficient to cover the seller’s other commitments to third parties: the contract must be construed in a business sense, and would thus be suspended.<sup>191</sup> Another relevant factor which may explain the lack of judicial clarification may have been the rise of arbitration, and the consequent removal of potentially relevant cases from the sight of the courts.<sup>192</sup> Other explanations for the limited judicial examination of the statutory provision may be that short deliveries were simply considered to be disputes over means and methods of ascertaining quantity to be settled by damages;<sup>193</sup> or they may be construed as breaches of obligations as to quality;<sup>194</sup> or merely as simple breaches of contract without any reference to the statutory provisions.<sup>195</sup> Of course, cases may be explained away because the buyer had accepted the goods and had failed to complain.<sup>196</sup> So it is unsurprising to find Bigham J holding in one case that ‘[n]o shipment within the meaning of the contract was ever made. The contract was to ship 500 loads; a shipment of 470 loads does not comply with the requirement’,<sup>197</sup> and yet only going so far as stating that the buyers ‘would have been

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<sup>191</sup> [1939] 2 All ER 432; 64 Ll L Rep 268; 44 Com Cas 276; 64 WLR 268. See also *Piesse v Tasmanian Orchardists & Producers Co-operative Association Ltd* (1919) 15 Tas LR 67, following *Biddell Brothers v E Clemens Horst Co* [1911] 1 KB 954: where loss at sea was accepted and within the contemplation of the parties, the buyer could not refuse to accept what was a short delivery; *Tebbits Bros v Smith* (1917) 33 TLR 508 (CA): seller was not bound to deliver a minimum quantity of 8 tons, where the contract was for the sale of ‘estimated 8/10 tons’ and the seller failed to deliver more than 6 tons 3 cwt 2 qr; *Hollis Bros v White Sea Timber Trust* [1936] 3 All ER 895; (1936) 56 Ll L Rep 78, 80: sale of timber on a standard form contract, which stated ‘in event of under-shipment of any item, buyers are to accept ... the quantity shipped’ but with a right to claim compensation for short delivery. The clause also provided that goods were sold ‘subject to shipment: any goods not shipped to be cancelled’. These terms gave the seller the option of whether to ship, meaning that the buyer was not entitled to compensation.

<sup>192</sup> See e.g. Ferguson, ‘Legal Ideology and Commercial Interests’, 30-31; R.B. Ferguson, ‘The Adjudication of Commercial Disputes and the Legal System in Modern England’, 7 *British Journal of Law and Society* (1980), 141, 142-148.

<sup>193</sup> *Bibby & Sons Ltd v Russo-British Grain Export Co Ltd* (1934) 48 Ll L Rep 61.

<sup>194</sup> *Cambrian Metal Co v Owen Bros* (1922) 10 Ll L Rep 676.

<sup>195</sup> *Ingram, Perkins & Co Ltd v E Whiteaway & Co* (1938) 62 Ll L Rep 168.

<sup>196</sup> *Shoobridge v A E Best & Co Ltd* (1922) 10 Ll L Rep 633.

<sup>197</sup> *Harland and Wolff Ltd v J Burstall and Co* (1901) 6 Com Cas 113, 116.

entitled to reject'.<sup>198</sup> This stuttering start did not bode well, but in the 1920s two decisions of the King's Bench would provide some flesh to the bare legislative bones.

In *Behrend & Co Ltd v Produce Brokers Co Ltd*,<sup>199</sup> the sellers sold cotton seed, to be shipped from Alexandria and delivered to the buyer's barges in London.<sup>200</sup> Upon arrival, the buyers paid as against the shipping documents, and following a partial delivery the ship travelled to Hull, discharged other cargos which had been loaded on top of the remaining cotton seed, and returned to London 14 days later to deliver the balance. The buyers refused to accept delivery of the balance. The question for the Court was whether the buyer was obliged under the contract to take the cotton seed that remained when the ship returned to London from Hull,<sup>201</sup> but Bailhache J swiftly turned this question on its head, deciding that the nature of the contracts covering the cotton seed was such that the buyer had the right to have the delivery made on arrival of the ship.<sup>202</sup> This delivery did not have to be immediate or continuous, bearing in mind the nature of the stowage,<sup>203</sup> but if the buyer is ready he is entitled to delivery of the whole 'from a vessel which has begun delivery to him before she leaves the port to deliver goods elsewhere.'<sup>204</sup> Following this, Bailhache J stated that 'the rest of the case is covered by' SGA 1893, s. 30, and as such the buyer could 'either reject the whole of the goods, including those actually delivered, in which case he can recover the whole of his money; or he may keep the goods actually delivered and reject the rest, in which

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<sup>198</sup> (1901) 6 Com Cas 113, 116.

<sup>199</sup> [1920] 3 KB 530. See also *Farley and Farley v Loughman* [1917] NZLR 588. The case concerned the application of the New Zealand Sale of Goods Act 1908, s. 32(1) (which provides the same rule as the English statute). Where the delivery was short by a substantial amount (thus avoiding application of the *de minimis* principle), it was held the buyer may reject the whole. However, Sim J, delivering the judgement of the New Zealand Supreme Court, did phrase the right to reject in an interesting manner, stating (at 591) 'the defendant was entitled, we think, to reject all the lambs.' The use of 'we think' might indicate an element of doubt over the right to reject, but it would seem that this doubt was either ignored or quite simply did not exist.

<sup>200</sup> The contract was for 200 tons of Sakellarides Egyptian cotton and 500 tons of Fayumi Egyptian cotton. The shippers notified that they had appropriated 176 tons of Sakellarides and 400 tons of Fayumi cotton on the *Port Inglis* in part fulfilment. This was accepted by the buyers; the claim was for failing to deliver the cotton on the *Port Inglis* rather than the cotton as a whole. The particular type of contract was important: had the sale been f.o.b. or c.i.f., as opposed to *ex ship*, then the buyers would have had to bear the risk of the particular stowage method used: see Michael Bridge, *The Sale of Goods*, 3rd ed., Oxford, 2014, para. 6.46, fn 261 and accompanying text.

<sup>201</sup> [1920] 3 KB 530, 533.

<sup>202</sup> Bailhache J began with stating 'the buyer under such a contract, and *where each parcel of goods is indivisible, as here*, has the right to have delivery on the arrival of the steamship', and continued with 'in the absence of any stipulation to the contrary the buyer, being ready with his craft, is entitled to delivery of *the whole of an indivisible parcel of goods*': [1920] 3 KB 530, 534-535 (emphasis added). This case bears some similarity to *Cobec Brazilian Trading and Warehouse Corp v Alfred C Toepfer* [1982] 1 Lloyd's Rep 528, affirmed [1983] 2 Lloyd's Rep 386, where Parker J said (at 531): 'This was a bulk cargo and the fact that part was to be discharged as one place and part at another does not go at all to the matter of shipment or the divisibility of the obligation to ship.'

<sup>203</sup> [1920] 3 KB 530, 534.

<sup>204</sup> *Ibid.*, 535.

case he must pay for the goods kept at the contract price, and he can recover the price paid for the undelivered portion.’<sup>205</sup> Bailhache J must have deliberately cited the section as a whole, rather than any specific sub-section, because the formulation he provides is a clear combination of the provisions of both sub-section (1) and (2). It is only in SGA 1893, s. 30(2), on excess delivery, that the buyer is provided with a right to reject ‘the whole’. Yet the case is clearly one of a short delivery. A question thus remained about the characterisation of the consequences of full rejection.

The decision in *Wm Barker (Jr) & Co Ltd v Edward T Agius Ltd*,<sup>206</sup> has been cited for the proposition that the statutory right to reject for short delivery entitles the buyer to terminate the contract.<sup>207</sup> During the 1926 coal strike, Agius sold Barker German coal briquettes; when the goods arrived in Liverpool the captain purchased the deck cargo from Barker (without informing Agius) in order to remove it to prevent the hold cargo from overheating. This enabled Barker to discover that the hold cargo, unlike the deck cargo, did not meet the contract description (the coal briquettes were the wrong size), whereupon they rejected the whole cargo. Did Barker have and validly exercise a right to reject the hold cargo?<sup>208</sup> The claim was ‘to reject the whole ... It is obviously a claim to rescind the contract as a whole and to recover back the whole of the contract price.’<sup>209</sup> Salter J said that if he ‘were free from authority’ then SGA 1893, s. 11(1)(c) would govern this case,<sup>210</sup> which would mean the breach would be treated as one of warranty ‘and not as a ground for rejecting the goods and treating the contract as repudiated.’<sup>211</sup> However, immediately following this, he said the following:

I should like to say that it is clear that rejection in this connexion means rescission. If a seller tenders to a buyer goods which are not in accordance with the contract and the buyer says to the seller, “This is not a performance of the contract; go and get proper goods and perform your contract,” in a sense he rejects those goods. But that kind of refusal is not what is meant by rejection in this Act. So far as being a

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<sup>205</sup> Ibid. In addition to citing the SGA 1893, s. 30, Bailhache J also cited *Devaux v Conolly*, the importance of which was noted above at text accompanying n 36.

<sup>206</sup> (1927) 33 Com Cas 120; 28 Ll L Rep 282; 43 TLR 751.

<sup>207</sup> See above n 1.

<sup>208</sup> (1927) 33 Com Cas 120, 127.

<sup>209</sup> Ibid., 137.

<sup>210</sup> Ibid., 129.

<sup>211</sup> Ibid., 130.

rescission or treating the contract as repudiated, that is an insistence on the contract. “Rejection” here means that the buyer might say to the seller: “This tender in purported performance of the contract is fundamental breach of the contract and it entitles me, if I please, to treat the contract as repudiated by you, and I do so treated it as rescinded.” Now where a buyer has accepted the whole of the goods there can be no question after that he cannot claim to reject and rescind.<sup>212</sup>

The right to reject for short delivery was thus a right to terminate the contract, because the short delivery was a fundamental breach.<sup>213</sup> The question before Salter J thus became: could Barker retain the acceptable deck cargo whilst rejecting the hold cargo, and recover from Agius the whole of the contract price except for the value of the deck cargo.<sup>214</sup> If this was possible, it would have ‘the result that after that neither party has any right against the other. The contract is in a sense repudiated, in a sense performed; neither wholly repudiated nor wholly performed.’<sup>215</sup> Therefore Salter J held that Barker had a right to accept 25 tons and to reject the remainder,<sup>216</sup> but there could not be rescission of ‘the contract as a whole and [recovery of] ... the whole of the contract price.’<sup>217</sup> The possibility, had the facts gone the other way, of the short delivery being a fundamental breach *per se*, would soon be curtailed by the House of Lords.

The House of Lords dealt with a sale of corn under cif terms in *Ross T Smyth & Co Ltd v TD Bailey Son & Co*,<sup>218</sup> where the contract was for 15,000 units. On the face of it ‘the amended invoice was 444 units short of the contract quantity’, but Lord Wright held that

[t]here is no evidence that the respondents ever purported at the time to rescind the contract on the ground that it had been repudiated by the act of the appellants in sending the amended invoice. There was no

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<sup>212</sup> Ibid. This passage is essentially replicated in 28 Ll L Rep 282, 286, but it is not so clearly stated in 43 TLR 751.

<sup>213</sup> However, the right to reject, as equivalent to a right to terminate, is only available in cases where the right to reject is exercised over the full quantity of goods: (1927) 33 Com Cas 120, 130-131.

<sup>214</sup> The price ratios were further distorted by the fact that over the 40 tons of deck cargo, 15 had been lost at sea and thus Barker was accepting only 25 tons.

<sup>215</sup> (1927) 33 Com Cas 120, 132-133.

<sup>216</sup> Ibid., 135. He equated the situation with that under SGA 1893, s. 30(3), as dealt with in *Moore v Landauer* [1921] 2 KB 519 (sale of goods to be packed in crates of 30, but delivered in crates of 24).

<sup>217</sup> (1927) 33 Com Cas 120, 137.

<sup>218</sup> [1940] 3 All ER 60; (1939) 67 Ll L Rep 147; (1939) 64 Ll L Rep 95 (CA).

categorical refusal on the part of the appellants, by words or by conduct, to perform the contract, or a categorical declaration that they would perform it only in the terms of the amended invoice.<sup>219</sup>

Although an intention to fulfil in a ‘manner substantially inconsistent’ with the contract would suffice to demonstrate repudiation,<sup>220</sup> ‘a mere honest misapprehension, especially if open to correction, will not justify a charge of repudiation’, and that was the case before the House.<sup>221</sup> There was nothing that went to ‘the root of the contract so as to constitute a total repudiation’, because there was nothing on the facts that made it appear that the sellers ‘were only delivering 15,000 units instead of 15,444 units ... such as to bring the issue within s30(1) and give the [buyers] the right to reject the 15,000 units.’<sup>222</sup> The short delivery must therefore go to the root of the contract; it cannot constitute a fundamental breach by itself.

Yet in spite of this reaffirmation of the root of contract approach, the failure of consideration approach was not entirely eliminated. In *Ebrahim Dawood v Heath*,<sup>223</sup> a breach of SGA 1889, s. 30(3) meant the buyers could reject the goods, and consequently recover the advanced price of the rejected goods as money had and received on a total failure of consideration. In reaching this conclusion, McNair J was obliged to consider SGA 1889, s. 30(1) due to the lack of authority on the nature of the right of recover under section 30(3),<sup>224</sup> and he held, in light of *Behrend & Co Ltd v Produce Brokers Co Ltd*, alongside *Devaux v Conolly* and *Biggerstaff v Rowatt’s Wharf Ltd*,<sup>225</sup> that ‘when one is considering the recovery of money under [SGA 1889, s. 30(1)] ... The claim is quite clearly a claim for recovery of money had and received ... The buyer’s right to recover that part of the purchase price which relates to the goods so properly rejected, is clearly a right ... to recover money for a consideration which has wholly failed’.<sup>226</sup> However, the failure of consideration approach

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<sup>219</sup> [1940] 3 All ER 60, 71 (Lord Wright). This mirrors the decision of the Court of Appeal: (1939) 64 Ll L Rep 95 (CA) 100 (Scott LJ): ‘they were acting in a way which showed that they were going to disregard the rule contained in [SGA 1893, s. 30(1)].’

<sup>220</sup> [1940] 3 All ER 60, 72, following *The Mersey Steel and Iron Co v Naylor, Benzon & Co* (1884) LR 9 AppCas 434, 438 (Lord Selbourne LC).

<sup>221</sup> [1940] 3 All ER 60, 72 (Lord Wright).

<sup>222</sup> Ibid., 73 (Lord Wright).

<sup>223</sup> [1961] 2 Lloyd’s Rep 512.

<sup>224</sup> Ibid., 518.

<sup>225</sup> [1896] 2 Ch 93 (CA).

<sup>226</sup> [1961] 2 Lloyd’s Rep 512, 519-520. It is accepted that some short delivery cases are, on the facts, so simple that they can be most efficiently dealt with as mere breaches of contract and can be resolved by awards of damages, for which see e.g. *E Braude (London) Ltd v Porter* [1959] 2 Lloyd’s Rep 161.

would never regain its former strength, and the failure to alter the statutory provisions in 1979, alongside other trends in contract law, killed off this putative revival.<sup>227</sup>

### III. THE AMERICAN EXPERIENCE: CLEARING UP THE BRITISH MISTAKES

It is useful to consider the position in American law, particularly following promulgation of the Uniform Sales Act in 1906 ('USA 1906'), as that Act replicated (to a large degree) the SGA 1893. The first step though is to consider the American position prior to the USA 1906. The initial starting point will be Story's important text on sales of 1847, due to its compendious nature and, in a useful correspondence to the purposes of this article, because Story hoped to lay down rules on delivery which 'will afford the clue to the labyrinth of apparently contradictory cases.'<sup>228</sup> Story stated that

whether a partial delivery of goods to the buyer, or the refusal or neglect of the other party to deliver the remainder, would entitle him to rescind the contract utterly, would depend upon whether the contract were an entirety or not. If the contract be entire, the buyer may refuse to accept a part, and may rescind the contract, upon returning, or offering to return, the goods.<sup>229</sup>

In support of this proposition he cited *Waddington v Oliver*, *Walker v Dixon*,<sup>230</sup> *Giles v Edwards*, and *Bragg v Cole*.<sup>231</sup> The clarity of Story's interpretation of the doctrine is in

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<sup>227</sup> Cf. Thomas, 'The right to reject for short delivery and termination'.

<sup>228</sup> Story, *Sales of Personal Property*, viii.

<sup>229</sup> Ibid., 371. The final sentence in the quoted passage is altered in later editions, reading 'Where there is an entire contract to deliver a large quantity of goods, consisting of distinct parcels, within a specified time, and the seller delivers part, he cannot, before the expiration of that time, bring an action to recover the price of that party; and the buyer may, if the seller fail to complete his contract, return the part delivered': William W. Story, *A Treatise on the law of Sales of Personal Property, with illustrations from the foreign law*, 3rd ed, J.C. Perkins, ed., Boston, 1862, 547. In addition to the cases cited for the point in the quoted passage (for which see text following this note), the following are cited: *Wright v Barnes* (1842) 14 Conn 518 (concerning description of the goods and whether there was an essential deficiency in the contractual performance); *Roberts v Beatty* (1830) 2 Penn 63; 21 Am Dec 410 (a buyer under an entire contract is not obliged to take a partial delivery, unless he accepts that part delivered); and *Dula v Cowles* (1855) 2 Jones (N Carolina) 454; 47 NC 454 (seller who delivers a partial quantity cannot recover for that delivered if he refuses to deliver the remainder).

<sup>230</sup> (1817) 2 Stark 281; 171 ER 647. The report is brief: Lord Ellenborough stated (at 283): 'This is the case of an entire contract for 100 sacks, part of these were delivered, to which objection might have been made as to quality, but the party did not stand upon that objection, but offered to pay the whole. And since the defendant was ready to perform the contract, and to pay for the whole at the price agreed upon, including the four sacks which were objected to, I am of opinion that the plaintiff could not afterwards split the contract, and bring his

marked contrast to the English commentaries, which had not gone so far as stating that a right to terminate for short delivery existed on the strength of the cases Story relied upon.<sup>232</sup> Story went on to the state the following:

Where, however, the contract is not entire, and the quantity or time of delivery is not of the essence of the contract, and there may be a compensation in damages for the deficiency, a partial failure of performance by the seller will not entitle the vendee to rescind the contract; but he must resort to his special action on the contract for damages.<sup>233</sup>

To this he cited various cases concerning the effect of breach of conditions which go to the root of the contract and partial performance,<sup>234</sup> the correct form of action for breach of contract,<sup>235</sup> the extinction of a right to rescind following acts of acceptance,<sup>236</sup> and other matters.<sup>237</sup> Although there was no specific reference to case-law on short delivery,<sup>238</sup> the combination of these cases (in terms of their general effect), along with the previous references to short delivery cases, provide strength for the general conclusion that short delivery can entail termination of contract. The tipping points as identified by Story accord with those identified (though not often explicitly) by the English writers and judiciary: whether the contract was entire, and whether the quantitative aspect went to the root of the

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action for part only. If the defendant had insisted upon an abatement being made in respect of the first four, I might have thought differently.'

<sup>231</sup> (1821) 6 Moore Rep 114: where purchaser of trees had taken away part of the trees but refused to pay until seller delivered the remainder, the seller could recover for the value of those taken under a count of goods sold and delivered, as the buyer's actions had disaffirmed the entirety of the contract.

<sup>232</sup> This is an extension of William W. Story, *A Treatise of the Law of Contracts Not Under Seal*, Boston, 1844, 341-342: 'Where the contract is an entirety, for a specific quantity of goods, and the vendor delivers only a part, the vendee may refuse to accept it; but if he retain the part delivered, he is liable, upon a *quantum meruit*, for their value. [Citing *Roberts v Beatty* (n 229); *Oxendale v Wetherell*; *Mavor v Pyne* (1825) 3 Bingham 285; 130 ER 522; *Shipton v Casson* (n 20); *Bragg v Cole* (n 231).]'

<sup>233</sup> Story, *Sales of Personal Property*, 372.

<sup>234</sup> *Boone v Eyre* (1789) 1 HI Bl 273 (mistakenly cited as page 270), note (a); 126 ER 160; *Franklin v Miller* (1836) 4 A & E 599 (mistakenly cited as page 559); 111 ER 912; *Mavor v Pyne* (1825) 3 Bingham 285; 130 ER 522 (where purchaser has only taken part of a larger quantity, he is liable for that part taken).

<sup>235</sup> *Davis v Street* (1823) 1 Car & Payne 18; 171 ER 1084 (action for money had and received is the proper action only where the contract is rescinded, not where it is merely a case of breach); *Weston v Downes* (1778) 1 Doug Rep 23; 99 ER 19 (assumpsit for money had and received will not lie where contract remains open).

<sup>236</sup> *Street v Blay* (1831) 2 B & A 456, 461; 109 ER 1212. Story developed this point further at 373-75.

<sup>237</sup> *Damer v Langton* (1824) 1 Car & Payne 168 (mistakenly cited as page 158); 171 ER 1148 (concerning the effect of evidence revealed in cross-examination).

<sup>238</sup> The reference to *Mavor v Pyne* (above n 234) is the closest, but still remains the inverse of short delivery.

contract. However, Story's emphasis on the necessity of termination should there be an entire contract where the particular quantity was essential to the contract was more powerful than the English approach. This would in turn affect later American analyses of the effect of short delivery, in particular the important decision of the US Supreme Court in 1885 in *Norrington v Wright*.<sup>239</sup>

*Norrington* concerned an Anglo-American sale of 5000 tons of iron, 'at the rate of about one thousand (1,000) tons per month, beginning February, 1880, but whole contract to be shipped before August 1, 1880'.<sup>240</sup> The seller shipped 'from various European ports 400 tons by one vessel in the last part of February, 885 tons by two vessels in March, 1,571 tons by five vessels in April, 850 tons by three vessels in May, 1,000 tons by two vessels in June, and 300 tons by one vessel in July, and notified to the defendants each shipment.'<sup>241</sup> The US Supreme Court held that the buyer had a right to rescind. Gray J, giving the judgement of the Court, began by following the contemporary decision of the House of Lords, *Mersey Steel and Iron Co Ltd v Naylor, Benzon & Co*,<sup>242</sup> and determined the situation before them was in fact an entire contract.<sup>243</sup> Following an earlier decision of the Supreme Court,<sup>244</sup> the Court held that the quantity specified was a material part of the contract and thus short deliveries in cases such as this gave the buyer to 'the same right to rescind the whole contract that he would have had if it had been agreed that all the goods should be delivered at once ... provided they distinctly and seasonably asserted the right of rescission.'<sup>245</sup>

A particularly interesting and valuable aspect of *Norrington* was the willingness of the US Supreme Court to take into account the English case-law. This was because

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<sup>239</sup> (1885) 115 US 188. This case can usefully be compared with *Filey v Pope* (1885) 115 US 213, decided on the same day, where the distinguishing feature was that the buyer was attempting to reject goods based on the seller altering the shipping location (in order to speed up delivery). There the Supreme Court reversed a trial judgment that this was not a material provision in the contract, noting (at 220) that the Court was not at liberty to determine the rationale for including such contractual provision. The implication (hinted at in Honnold, 'Buyer's Right of Rejection', 462 fn 24) is that the right to reject does not necessarily depend on the seriousness of the breach (which was far greater in *Norrington*). The decision in *Norrington* was considered by Pollock: Frederick Pollock, *Principles of Contract: A treatise on the general principles concerning the validity of agreements in the law of England*, 5th ed., London, 1889, 254 *et seq.*

<sup>240</sup> (1885) 115 US 188, 189.

<sup>241</sup> *Ibid.*, 190.

<sup>242</sup> (1884) LR 9 App Cas 434, 439 (Lord Selbourne LC).

<sup>243</sup> (1885) 115 US 188, 203-204.

<sup>244</sup> *Brawley v United States* (1877) 96 US 168, 171-172: '[w]hen no ... independent circumstances are referred to, and the engagement is to furnish goods of a certain quality or character to a certain amount, the quantity specified is material, and governs the contract.'

<sup>245</sup> (1885) 115 US 188, 205.



diversity in the law, as administered on the two sides of the Atlantic, concerning the interpretation and effect of commercial contracts of this kind, is greatly to be deprecated, [and so] it is proper to add that upon a careful examination of the cases referred to they do not appear to us to establish any rule inconsistent with our conclusion.<sup>246</sup>

What they meant was that the weight of authority was in favour of buyer having the right to rescind (i.e. terminate) the contract for short delivery. Gray J cited *Hoare v Rennie*, and *Coddington v Paleologo*,<sup>247</sup> as examples of the right to rescind for short delivery, and contrasted those decisions with the approaches taken in *Simpson v Crippin*, and *Brandt v Lawrence*,<sup>248</sup> where the right to rescind was restricted (on the grounds of acceptance of short deliveries). For Gray J, this conflict was resolved by the decision of the House of Lords in *Bowes v Shand*,<sup>249</sup> in which ‘the opinions there delivered the general principles underlying this class of cases are most clearly and satisfactorily stated.’<sup>250</sup> Gray J cited dicta from Lord Cairns LC and Lord Blackburn, but appeared to ignore the fact that the approach from *Simpson* and *Brandt* was followed by the House of Lords, which attempted to solve the problem by demonstrating the materiality of contractual provisions concerning quantity. Gray J then noted the decisions in *Reuter, Hufeland & Co v Sala & Co*,<sup>251</sup> and *Honck v Muller*,<sup>252</sup> before arguing that the decision in *Mersey Steel* was only really authority for the rule that the seller cannot rescind following the buyer’s failure to pay ‘unless the circumstances evince an intention on his part to be no longer bound by the contract’.<sup>253</sup> Nevertheless, Gray J noted that whilst the Court of Appeal in *Mersey Steel* presented

*dicta* ... tending to approve the decision in *Simpson v. Crippin*, and to disparage the decisions in *Hoare v. Rennie* and *Honck v. Muller*, ... in the House of Lords *Simpson v. Crippin* was not even referred to, and Lord Blackburn, who had given the leading opinion in that case, as well as Lord Bramwell, who had delivered the leading opinion in *Honck v.*

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<sup>246</sup> Ibid., 206.

<sup>247</sup> (1866-67) LR 2 Exch 193.

<sup>248</sup> (1876) LR 1 QBD 344.

<sup>249</sup> (1876-77) LR 2 App Cas 455.

<sup>250</sup> (1885) 115 US 188, 208.

<sup>251</sup> (1879) 4 CPD 239.

<sup>252</sup> (1881) 7 QBD 92.

<sup>253</sup> (1885) 115 US 188, 210.

*Muller*, distinguished *Hoare v. Rennie* and *Honck v. Muller* from the case in judgment. ... Upon a review of the English decisions, the rule laid down in the earlier cases of *Hoare v. Rennie* and *Coddington v. Paleologo*, as well as in the later cases of *Reuter v. Sala* and *Honck v. Muller*, appears to us to be supported by a greater weight of authority than the rule stated in the intermediate cases of *Simpson v. Crippin* and *Brandt v. Lawrence*, and to accord better with the general principles affirmed by the House of Lords in *Bowes v. Shand*, while it in no wise contravenes the decision of that tribunal in *Mersey Co. v. Naylor*.<sup>254</sup>

This case, which would be reinforced two years later in *Cleveland Rolling Mill v Rhodes*,<sup>255</sup> illustrates a significantly distinct approach in the American jurisprudence, whereby the right to terminate for short delivery was stronger, and more easily identified. Yet this distinction would not be immediately recognised. In the 1899 American edition of *Benjamin on Sale*,<sup>256</sup> it was said that if ‘the delivery is of a quantity less than that sold, it may be refused by the purchaser’.<sup>257</sup> Following this statement, the same four cases present in the original first edition of *Benjamin* were set out: *Waddington v Oliver*; *Oxendale v Wetherell*; *Hoare v Rennie*;<sup>258</sup> and *Morgan v Gath*. This close similarity to the English position following Chalmers’ work makes the changes that followed all the more striking.

The Uniform Sales Act 1906 (‘USA 1906’) was drafted by Samuel Williston,<sup>259</sup> and was a conscious copy of the SGA 1893.<sup>260</sup> Three years later Williston published his text on

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<sup>254</sup> *Ibid.*, 211.

<sup>255</sup> (1887) 121 US 255. This case concerned the sale of iron, of which a certain quantity was agreed to be ready for shipment when navigation opened in 1881. However, only an insufficient quantity was made ready. For Gray J, the problem the seller faced was that a contract to sell and ship a certain quantity of goods at a certain time means the quantity and time of delivery are (at 261-62) ‘essential terms of the agreement. The seller does not perform his agreement by shipping part of that amount at the time appointed, and the rest from time to time afterwards; and the buyer is not bound to accept any part of the iron so shipped.’ Gray J thus held that the defendant was entitled to refuse to accept the short quantity following opening of navigation. This decision rests entirely on Gray J’s earlier analysis in *Norrington*.

<sup>256</sup> Edmund H. Bennett and Samuel C. Bennett, eds., *Benjamin’s Treatise on the Law of Sale of Personal Property; with References to the American Decisions and to the French Code and Civil Law*, Indianapolis and Kansas City, 1899.

<sup>257</sup> *Ibid.*, §690. Citing *Oxendale v Wetherell*; *Colonial Insurance Company of New Zealand v Adelaide Marine Insurance Company* (1887) LR 12 App Cas 128 (PC); *Brandt v Lawrence* (1876) LR 1 QB 344 (CA); *Bowes v Shand* (1876-77) LR 2 App Cas 455; *Reuter, Hufeland & Co v Sala & Co* (1879) 4 CPD 239, 244 (CA).

<sup>258</sup> This decision was described as ‘strongly criticised’.

<sup>259</sup> For a useful analysis of Williston’s theoretical position, see Mark L. Movsesian, ‘Rediscovering Williston’, 62 *Washington & Lee Law Review* (2005), 207.

<sup>260</sup> Samuel Williston, ‘The Law of Sales in the Proposed Uniform Commercial Code’, 63 *Harvard Law Review* (1949-50), 561, 563-64.

sales, which covered the common law and the position following the USA 1906.<sup>261</sup> The USA 1906, s. 44(1) dealt with short delivery:

Where the seller delivers to the buyer a quantity of goods less than he contract to sell, the buyer may reject them, but if the buyer accepts or retains the goods so delivered, knowing that the seller is not going to perform the contract in full, he must pay for them at the contract rate. If, however, the buyer has used or disposed of the goods delivered before he knows that the seller is not going to perform his contract in full, the buyer shall not be liable for more than the fair value to him of the goods so received.<sup>262</sup>

For Williston this section was ‘primarily considered’ with ‘defects in quantity [which] may be important in considering the seller’s liability under a contract by which the seller has agreed to deliver a specified quantity’, but that it is ‘an entirely different question, however, whether defective performance of his contract by the seller justifies the buyer in terminating it altogether.’<sup>263</sup> Unlike many others, Williston met this question of termination head on:

[It] might be urged ... that if the defect was slight in comparison with the amount involved in the contract, the buyer should be compelled to accept the defective performance and rely upon his claim for damages, under the rule of contracts that where a breach does not go to the essence, the injured party cannot refuse to go on with the contract but must seek redress in damages.<sup>264</sup>

Williston dismissed this approach on the basis that the case-law ‘the authority of which was accepted in the provisions of the Sales Act, show, however, that a defect in quantity is a breach going to the essence, and that the buyer, except under special circumstances of custom or contract, cannot be compelled to accept a quantity different from that for which he

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<sup>261</sup> Samuel Williston, *The Law Governing Sales of Goods at Common Law and under the Uniform Sales Act*, New York, 1909.

<sup>262</sup> The provisions beginning ‘knowing that the seller is not going to perform ...’ were additional to the SGA 1893 provisions: Williston, *Sales of Goods*, §458 fn 74.

<sup>263</sup> Ibid., §459.

<sup>264</sup> Ibid.

bargained.<sup>265</sup> A short delivery would give the buyer the right to terminate, because a defect in quantity is of the essence of the contract.<sup>266</sup> It is evident that Williston based this argument on the decisions in *Norrington* and *Cleveland Rolling Mills*,<sup>267</sup> and, as Honnold noted, it must be recognised that ‘drafting of the Uniform Sales Act was influenced by a distaste for the uncertainty possible under the British statute with respect to right of rejection.’<sup>268</sup> Williston arguably thought that termination had the benefit of providing justice in certain cases,<sup>269</sup> and in expressly accepting that short delivery would justify termination, the effect of the right to reject would be clarified. This understanding of short delivery, resting on the importance of quantitative matters in sales, would find acceptance in the post-USA 1906 jurisprudence.<sup>270</sup>

#### IV. CONCLUSION

The authority of commercial law rests in its evolution according to mercantile needs, and its provision of pragmatic solutions, which it generally provides.<sup>271</sup> Nevertheless, there are areas

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<sup>265</sup> Ibid. The special circumstances would be where the remaining delivery is made within the terms of the delivery period as set out by the contract, because not all defects in quantity justify the buyer ‘in immediately renouncing all obligation under the contract’. Williston supported this point with references (at fn 76) to, *inter alia*, *Tetley v Shand* (1872) 35 LT 658; 20 WR 206; *Borrowman, Phillips & Co v Free & Hollis* (1878-79) LR 4 QBD 500; and *Ashmore v Cox* [1899] 1 QB 436. Although these cases concerned non-quantitative defects, the rule they demonstrate is that ‘if a tender defective in any essential respect may be cured by a subsequent correct tender, it necessarily follows that this rule must apply to tenders defective because of the improper quantity of goods.’ For later English application of this principle, see e.g. *EE & Brian Smith (1928) Ltd v Wheatsheaf Mills Ltd* [1939] 2 KB 302, 314-315.

<sup>266</sup> See also Williston, *Sales of Goods*, §460: if the contract was for payment by ‘number, weight, or measure’, then the buyer is liable ‘to pay at this rate for the quantity of goods actually received’, but if ‘the original bargain provided for a lump price, it would seem that the buyer, if he accepted the goods, would become liable for that price.’ Thus the USA 1906 protects buyers who purchase goods on a ‘pro rata’ basis i.e. where the price depends on the actual ‘number, weight, or measure’. Those buyers who fail to specify this would lose out in that they would be obliged to pay the contract price; their losses though would be somewhat mitigated by a right as against the seller for his failure to perform. In support of this Williston (at §460 fn 83 and accompanying text) cited *Bowker v Hoyt* (1836) 18 Pick 555; 35 Mass 555; 1836 WL 3198, where the Supreme Judicial Court of Massachusetts held, following *Oxendale v Wetherell* and *Champion v Short*, that if the buyer accepted a short delivery, the contract would be severed and the buyer liable for that which he accepted.

<sup>267</sup> He also referred to a small number of state decisions: *Churchill v Holton* 38 Minn 519; 38 NW 611 (1888) (purchaser may waive the strict terms of an entire contract by accepting part); *Hill v Heller* 27 Hun 416 (NY 1882); *Inman v Elk Cotton Mills* 116 Tenn 141; 92 SW 760, 761 (1906): ‘A delivery of a less number was not a compliance with this contract. So far as it affected the contract relations of the parties, a failure in the matter of 1 bale [50 bales ordered, 49 delivered] was as much as a failure to deliver any greater number of bales. The complainants sue to recover for the breach of an entire contract, and in order to maintain their bill they must show a compliance or a willingness to comply with it as an entirety. Failing in this latter regard, they fall altogether.’

<sup>268</sup> Honnold, ‘Buyer’s Right of Rejection’, 471.

<sup>269</sup> Movsesian, ‘Rediscovering Williston’, 260.

<sup>270</sup> See e.g. *Beals v Hirsch* 214 AD 86, 94; 211 NYS 293, 300 (NY Appellate Division 1st Dept 1925):

‘Quantity is always of the essence of a sales contract’.

<sup>271</sup> Cf. Patrick Devlin, ‘The Relation Between Commercial Law and Commercial Practice’, 14 *Modern Law Review* (1951), 249, 251: ‘The Sale of Goods Act is, I suppose, the custom of merchants as developed by

of commercial law where this thesis breaks down. As Scrutton LJ noted in 1930, '[a]s far as I remember, in every commercial litigation this question of whether you can reject or have a claim for damages has constantly been raised in various kinds of trade, and under various kinds of contracts, and, I daresay, will continue to be raised for centuries yet to come.'<sup>272</sup> The formulation of a right to reject for short delivery, without any corresponding explanation of the relationship between the right to reject and termination, has left a void in our understanding of the effect of certain types of breaches in sales contracts. The lacuna in short delivery can be partially attributed to Benjamin, though blame can also be placed on Lord Blackburn's shoulders, and Chalmers' reputation as a great commercial draftsman,<sup>273</sup> must surely be subject to question. As a counter-point to the English history, the American experience demonstrates that it is possible to clarify this particular problem (the disconnection between the right to reject and termination) in a swift and effective manner. Williston, who built on Story's analysis whilst introducing his own novel interpretation, broke the chains of the English experience and explained, in a substantial if not comprehensive manner, what the effect of a short delivery was beyond a mere right to reject.

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lawyers, but developed to such an extent that most of it is now as strange to the average business man as the laws of contract bridge would be to the player who first thought of whist.'

<sup>272</sup> *Meyer v Kivisto* (1930) 142 LT 480, 481.

<sup>273</sup> Chalmers was 'an acknowledged master of the technique of codification': Law Commission and Scottish Law Commission, *Sale and Supply of Goods* (Law Com 160, Scot Law Com 104, 1987) para 1.5.